George Pendergast

CASES

SUMMARILY DISPOSED OF

ON MOTION

IN THE

UNITED STATES SUPREME COURT.

BY

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PREFACE.

THE many cases summarily disposed of on motion by the United States Supreme Court from term to term, for years past, upon jurisdictional questions, rules of practice, or trivial questions, induced belief that a book which would enable the practitioner to review the decisions upon these oft-recurring questions, without having to examine all the volumes containing the decisions, would be of service to the profession. This volume is, therefore, designed to present, in a convenient form, decisions embracing every principle adjudicated upon motion, down to the beginning of October Term, 1885. It is not intended to reproduce cases of exact similarity, but to present those which, though similar, differ in some respect—probably material.

A purpose of condensing has excluded the publication of the names of counsel, which it would have been agreeable to introduce; names also of the distinguished jurists who delivered the opinions, and in many instances authorities cited in the opinions, have been omitted—all with the intention of making the volume as compact and brief as practicable. It has not been considered necessary to quote the statements of the cases, as nearly all of the opinions contain sufficient statements; and the object of this compilation is believed to be accomplished by a report of the opinions with syllabi. The entire space has therefore been devoted to the substance of the decisions.

CHARLES H. ARMES.

WASHINGTON, D. C., January, 1886.

EXPLANATION.

The omissions from the opinions, which are indicated by dots, thus, ... , are of authorities cited by the court, mentioned in the Preface.

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CASES

SUMMARILY DISPOSED OF ON MOTION

IN THE

SUPREME COURT OF THE UNITED STATES.

DAVIS *v.* CORBIN *et al.*; GAINES *v.* CORBIN *et al.*, 113 U. S. 687.

BOND—DOCKETING A CAUSE—EFFECT OF.

Color of right to a dismissal must appear, or a motion to affirm will not be entertained.

On motion to dismiss or affirm.

OPINION.—This is the second time a motion has been made to dismiss the case of Davis *v.* Corbin. The ground of the present motion is that the security required by § 1000 Rev. Stat., has never been given. Against this it is shown that a supersedeas bond was accepted by the judge who signed the citation on the 8th of April, 1884. The judgment brought under review by the writ of error was rendered on the 11th of February, 1884. The writ of error was sued out and served on the 7th of March in the same year, and the citation was also signed and served on that day. The cause was duly docketed in this court by the defendant in error on the 22d of March, in advance of the return day of the writ. On the same day the defendant in error filed his motion to dismiss for other reasons than that now relied on. The plaintiff in error was notified that the motion would be presented to the court on the 14th of April. When the motion was filed the security had not been given,

but before the time fixed for hearing it was tendered in proper form and accepted. Early in the present term that motion was overruled.

The docketing of the cause by the defendant in error in advance of the return day of the writ did not prevent the plaintiff in error from doing what was necessary while the writ was in life to give it full effect. The present motion to dismiss is, therefore, overruled.

The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8th, 1876, 91 U. S. vii, and in Whitney *v.* Cook, 99 U. S. 607, decided during the October Term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record at least some color of right to a dismissal.

This practice has been steadily adhered to ever since, and, in our opinion, prevents our entertaining the motion to affirm in this case.

The motion is consequently *Denied.*

GUMBEL *v.* PITKIN, 113 U. S. 545.

ASSIGNMENT OF ERRORS—FINAL JUDGMENT—NAMES OF PARTIES.

That no assignment of errors was transmitted with the record, is not sufficient ground for a motion to dismiss for want of jurisdiction.

An order dismissing an intervention of a creditor claiming priority of distribution, which disposes of his rights, is a final judgment as to that issue, as to which he has a right to a writ of error. So, also, is an order distributing proceeds of a sale, which disposes of the fund.

"Where the writ gives all the names of the parties as they are found in the record in the case in the Circuit Court," and there is nothing to show that there were other parties than those so named, this court will not presume that there were other parties, in the absence of evidence thereof in the record.

Motion to dismiss or affirm, denied.

OPINION.—A motion is made to dismiss the writ of error in this case on the following grounds:

1. The writ of error was never served by lodging a copy thereof with the clerk of the court.

2. No assignment of errors was transmitted with the record, as required by the rules of the court and by § 997 Rev. Stat.

3. The writ of error does not set forth the names of the members of the several firms mentioned in the writ as defendants, and there is nothing in the record by which this irregularity may be corrected.

4. The original petition demands restoration of the goods seized by the marshal, to the sheriff, on the ground of previous seizure by that officer under an attachment emanating from the State court; the amended petition abandons that ground, and goes for priority in the distribution of the proceeds of sale in the marshal's hands, the result of an order of sale *pendente lite;* such a petition is a mere rule or motion for distribution of proceeds, and a judgment rendered thereon is not reviewable by writ of error.

As to the first of these, it appears to be unfounded in fact, as the record now before us shows that the writ was filed in the Circuit Court June 14th, 1884, and is so marked over the signature of the clerk.

The second ground is met by the decision of this court in the case of the School District of Ackley *v.* Hall, 106 U. S. 428, where it is said that a writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of § 997 Rev. Stat. Nor does Rule 8 require a copy of assignment of errors in the transcript when no such assignment was filed in the court below.

The fourth ground of dismissal is equally untenable. The record shows that a large number of the creditors of Joseph Dreyfus, of the city of New Orleans, sued him in the Circuit Court of the United States, and in those actions, or in one of them, a writ of attachment was issued and levied on the

goods of Dreyfus by the marshal, who took possession of them. In this action Gumbel intervened by petition, as he was authorized to do by the laws of Louisiana, and by the decision of this court in Freeman *v.* Howe, 24 How. 450, alleging that a seizure under a writ of the State court in his favor had been made by the sheriff before the marshal's levy, and he claimed a priority of lien on those goods. The goods were sold under an order of the Circuit Court *pendente lite,* and the proceeds distributed to other parties, and Gumbel's intervention dismissed on the ground that the sheriff had made no seizure prior to that of the marshal. The order dismissing Gumbel's intervention disposes of his rights, and is a final judgment as to that issue, as to which he has a right to a writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund.

As regards the third ground for dismissal, the case is not so clear. This court has undoubtedly, from the case of Deneale *v.* Stump, 8 Pet. 526, to that of The Protector, 11 Wall. 82, held that all the parties to the judgment must be named in the writ of error, and that the use of the name of one of the parties, with the addition of the words "and others," as "Joseph W. Clark and others," does not satisfy the requirement; but, on the contrary, shows that there were parties to the judgment or decree in the inferior court who are not named in the writ. It is upon this ground that the judgment in the case of Smith *v.* Clark, 12 How. 21, is distinctly placed by Chief Justice Taney in the opinion.

In the case of The Protector, 11 Wall. 82, the appeal was taken in the name of William A. Freeborn & Co., while the record showed that William A. Freeborn, James F. Freeborn, and Henry P. Gardner were the libellants.

In this court counsel insisted that the objection was not fatal, and that the appeal might be amended, but the court held otherwise, and dismissed the appeal.

In the present case the defendants are named in the writ,

in almost every instance, by such designations as B. Dreyfus & Co., Corning & Co., John Osborn, Son & Co., and so on.

We should have no hesitation now under § 1005 of the Revision, which section became a law by the Act of June 1st, 1872, after the case of The Protector was decided, to permit the plaintiff in error to amend if there was anything to amend by. But the transcript of the record before us shows that these parties came into the Circuit Court as defendants or intervenors, and prosecuted their rights throughout the whole proceedings by the designations applied to them in this writ of error, and by no other names whatever.

No amendment of the writ to remove this difficulty can, therefore, be made from the record before us.

If the plaintiff in error has a just foundation for his assertion of error in the judgment against him, it would be a great and apparently irremediable injustice to dismiss his writ. The present case differs from that of The Protector, the latest on the subject, for, in that case, the record showed that William A. Freeborn, James F. Freeborn, and Henry P. Gardner were the libellants whose libel was dismissed, and no good reason is to be seen why they did not bring their appeal in those names instead of William A. Freeborn & Co.

In the case of Smith *v.* Clark, the objection relied on in the opinion of the court, 12 How. 21, is, that this form of appeal showed to the court that there were other parties to the decree below not named, and, therefore, not brought before this court by the appeal.

Neither of these cases cover the present. In this case the plaintiff in error gives his own full name, and he is the only plaintiff. He describes, in his writ of error, all the parties opposed to him, by the names and designations which they gave themselves in their pleadings, motions, and proceedings in the court below, and by which they are mentioned in the judgment which distributes to them the money that he as-

serts should rightfully go to him. We are not advised, as in the Freeborn case, by the record that the appellants had other names than Freeborn & Co., nor, as in the Darneal (?) case, that there were others who were attempted to be made parties by that word, with no other designation.

We think that, where the writ gives all the names of the parties as they are found in the record of the case in the Circuit Court, and where there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record, and would lead to a manifest injustice.

The motion to dismiss is overruled, and the case is one to be heard on the merits and not to be affirmed on motion.

Both motions are denied.

NEW ORLEANS INS. CO. *v.* ALBRO COMPANY, 112 U. S. 506.

BOND—FORM AND APPROVAL OF; DEFECTS IN—FRIVOLOUS QUESTION—WRIT OF ERROR—FORM OF—SUED OUT FOR DELAY—CORRECTION OF DEFECTS IN.

Where the defense in a suit on an insurance policy was, in effect, that the cargo lost by stranding ought to have been gathered up and forwarded to the place of destination, *Held*, that the writ of error was sued out for delay.

On motion to dismiss or affirm.

OPINION.—The motion to dismiss is put on the ground that the security bond is defective: 1st, because the sureties are not jointly or severally bound for the full amount of the obligation, but each severally for a specified part only; and, 2d, because the judgment brought under review by the writ of error is not described with sufficient certainty.

The bond is certainly unusual in form, but we cannot say that it is not within the legal discretion of a justice or judge, under some circumstances, to take it. Cases may arise in which it will be impossible to obtain security if this mode is not adopted. It being within the discretion of the judge to accept such a bond as security, his action in that particular is final, and, under the rule laid down in Jerome *v.* McCarter, 21 Wall. 17, not reviewable here.

In the matter of the description of the judgment, the bond is in the form which has been much in use, except that it omits the term at which the judgment was rendered.

The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security.

It is apparent from the record that the writ of error must have been sued out for delay only. The suit was upon a policy issued by the insurance company to the Albro Company for the insurance of a cargo of mahogany and cedar wood on board the bark Commodore Dupont, against the perils of the sea and the barratry of the master of the bark at and from the port of Santa Anna, Mexico, to the port of New Orleans. The bark was driven on the bar at Santa Anna, and wrecked in a severe gale while loading, and her cargo was cast on the sea and driven ashore; while in this condition the cargo was sold, and the proceeds, which were but small, after deducting charges and expenses, paid over by the master to the Albro Company. In the petition the loss of the vessel and her cargo is averred, and also the sale of the cargo under the orders of the port authorities at Santa Anna. In the answer the loss of the vessel was admitted, but it was insisted, by way of defense, that due diligence was not used by the master in saving the cargo and forwarding it to its place of destination as the policy required. Upon the

trial the "plaintiffs introduced evidence tending to show that the sale of the insured cargo by the master was made under such circumstances as constituted a necessity for making the same, and rendered the act of the master in making the same the act of the defendants, in that, under the law of insurance, the authority therefor would be implied. The defendants introduced evidence tending to establish the absence of those circumstances which so gave authority to the master to make such sale, and tending to show the failure on his part to seasonably communicate with the owners and underwriters; and the same evidence, introduced by the defendants, besides being applicable to the two issues, as stated above, tended further to establish that the act of the master in making the said sale of the insured cargo was an act of barratry, in that it was made, and especially was made, in time and manner knowingly contrary to his best judgment and to the injury of whomsoever it might concern; and all the evidence tending to establish a barratrous sale came from the defendant.

"The court instructed the jury that, under the pleadings, the evidence which had been adduced before them in the cause authorized them to inquire and find

"1st. Whether the sale of the master was made under such circumstances as, according to the principles or rules in the law of marine insurance (which were stated to the jury) made the act of sale on the part of the master the act of the underwriters, and that if upon this question they found for the plaintiff, then the defendant's liability was established.

"2d. The court instructed the jury that if they found that, according to the principles and rules of marine insurance (which had been stated to them), the act of sale on the part of the master was not the act of the underwriters, but they found that, while he had exceeded his authority, he had acted in good faith, then the defendant was discharged from all liability.

"3d. The court further instructed the jury that if they found that, according to the rules and principles of marine insurance (which had been explained to them), the act of sale by the master was not the act of the underwriters, the defendants, still, if they found that such sale was barratrously made, *i. e.*, was an act of barratry, which was defined to them by the court, then also the liability of the defendant was established.

"No exception was taken by the counsel for the defendant to the rules or principles of law by which the court, in its instructions, had stated they must determine the question of implied authority from the defendant on the part of the master to make the sale, nor to the test by which the jury was to determine whether an act of barratry had been committed.

"But the counsel for the defendant, before the jury retired to deliberate upon their verdict, reserved an exception to that part of the charge of the court alone by which the court submitted the question of barratry or no barratry to the jury, in the instruction numbered 3d."

We are unable to discover even the semblance of an error in the part of the charge excepted to. The petition presented distinctly the question of the liability of the insurance company, under its policy, for the loss of the cargo which had been stranded by a peril of the sea and sold by the master of the vessel. The defense was, in effect, that the cargo ought to have been gathered up after the stranding and forwarded to the place of destination. Upon the issue thus raised by their pleadings the parties went to trial, and testimony was submitted to the jury on both sides. That of the insurance company tended to show, not only that the sale was not justified by the circumstances, but that in making the sale the master was guilty of barratry. The court told the jury, in substance, that if the master, acting in good faith, sold the cargo when he ought not to have done so, the

insurance company would not be bound by his sale; but, "if the sale was barratrously made, *i. e.*, was an act of barratry," the company must make good the loss—and this clearly because it had insured against the barratry of the master as well as the perils of the sea. It is true that the parties did not, in their pleadings, rely upon the barratry either as a ground of action or of defense, but the insured did sue for the loss occasioned by the perils of the sea and the sale by the master, and the insurance company, in attempting to prove that the sale was not justifiable under the circumstances, gave evidence tending to prove that it was barratrously made. It was upon this evidence coming from the insurance company that the court told the jury that the barratry of the master would not relieve the company from its liability in this action for the loss which followed from the stranding by a peril of the sea, and the subsequent barratrous sale. Certainly we are not called upon to retain a case on our docket for argument upon such a question.

There was sufficient color of right to a dismissal to make it proper for us to entertain a motion to affirm with the motion to dismiss.

The motion to dismiss is denied, but that to affirm is granted. *Affirmed.*

ST. PAUL, MINNEAPOLIS, ETC., R. R. Co. *v.* BURTON, 111 U. S. 788.

EVIDENCE—PRACTICE.

The certificate of the clerk, under seal of his office, that the judge was duly qualified, is not necessary to the admissibility in evidence of an exemplification of a record of naturalization, in a question of removal from a State to a U. S. Circuit Court.

On motion to dismiss or affirm.

OPINION.—The order remanding this case is affirmed. The Act of March 3d, 1875, c. 137, § 5, 18 Stat. 470,

makes it the duty of the Circuit Court to remand a suit which has been removed from a State court when it satisfactorily appears that the "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." The exemplification of the record of Moses Burton, which was offered in evidence, did not require, to complete its authentication, the certificate of the clerk under the seal of his office that the judge of the court was duly commissioned and qualified. The certificate may be to some extent defective in form, but we think the record as a whole could properly be considered by the judge on the question of remanding the cause.

Affirmed.

TUPPER *et al. v.* WISE, 110 U. S. 398.

AMOUNT.

Distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction.

On motion to dismiss or affirm.

OPINION.—This was a suit brought by Wise, the defendant in error, against the plaintiffs in error and others to recover the possession of Sec. 21, T. 3 N., R. 8 E., Mount Diablo base and meridian containing six hundred and forty acres of land. Tupper answered, denying that he was in possession of any part of the section except the northeast quarter, and to that he set up a pre-emption claim and settlement. Lenfesty made the same answer and claim as to the southeast quarter. There was no joint ownership or joint possession. Each defendant claimed a separate and distinct interest in a separate and distinct part of the land. The jury found that the "defendants were each severally in the wrongful possession of the lands respectively described in their several answers and no others, and that the value of the rents and profits of the lands so held and possessed by

defendant Tupper is one hundred dollars, of the land so held and possessed by defendant Lenfesty one hundred dollars, and that the value of each one of said tracts of one hundred and sixty acres is three thousand dollars, and of the two of them six thousand dollars. Judgment was thereupon rendered against Tupper for the possession of his tract and one hundred dollars damages, and against Lenfesty in the same way. Tupper and Lenfesty then sued out this writ of error which Wise moves to dismiss, because the claims of the several plaintiffs in error are separate and distinct, and the value of the matter in dispute with either of them does not exceed five thousand dollars.

This motion is granted. The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction. The whole subject was fully considered at the last term in *Ex parte* Baltimore and Ohio Railroad Company, 106 U. S. 5; Farmers' Loan and Trust Company *v.* Waterman, id. 265; Adams *v.* Crittenden, id. 576; Schwed *v.* Smith, id. 188. The stipulations as to the value of the property which is found in the record cannot alter the case, for it states that the aggregate value of the two quarter-sections exceeds five thousand one hundred dollars, and the verdict fixes the value of each quarter at three thousand dollars. *Dismissed.*

SCHOOL DISTRICT OF ACKLEY *v.* HALL, 106 U. S. 428.

ASSIGNMENT OF ERRORS.

Failure to return with a writ of error, an assignment of errors, is no ground of dismissal for want of jurisdiction.

On motion to dismiss or affirm.

OPINION.—A failure to annex to or return with a writ of error an assignment of errors, as required by § 997

of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, Rule 21, it will ordinarily be enough.

There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm. *Motion denied.*

SWOPE *v.* LEFFINGWELL, 105 U. S. 3.

JURISDICTION—FEDERAL QUESTION.

Where this court has jurisdiction, a Federal question being involved, but the decision below being pursuant to precedents of this court, a motion to affirm will be granted.

On motion to dismiss or affirm.

OPINION.—We have jurisdiction of this case. The motion to dismiss is therefore denied; but as the only Federal question presented on the merits was decided by the court below in accordance with our rulings in National Bank *v.* Matthews, 98 U. S. 621, and National Bank *v.* Whitney, 103 U. S. 99, the motion to affirm is *Granted.*

MICAS *v.* WILLIAMS, 104 U. S. 556.

AFFIDAVITS—AMOUNT—COLOR OF RIGHT—FRIVOLOUS QUESTION.

A jurisdictional amount being shown by affidavits to be involved, a motion to dismiss is denied; however, there being a color of right to a dismissal, and the question involved appearing to be frivolous, the motion to affirm is granted.

On motion to dismiss or affirm.

OPINION.—The affidavits which have been filed by the plaintiff in error, in opposition to these motions, are proba-

bly sufficient to establish the fact that the value of the matter in dispute exceeds five thousand dollars.

The motion to dismiss is, therefore, denied; but, on looking into the record, we are entirely satisfied the writ was taken for delay only. No assignment of errors has been annexed to, or returned with, the writ, as required by § 997 of the Revised Statutes; and every question presented by the bill of exceptions, or suggested upon the argument, appears to us so frivolous as to make it improper to keep the case here for any further consideration. There was on the record, as it stood when the motions were made, at least sufficient color of right to a dismissal to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5.

Motion to affirm granted.

HINCKLEY *v.* MORTON, 103 U. S. 764.

AFFIRM—COLOR OF RIGHT—DISMISS.

A motion to affirm may be united with a motion to dismiss where there is color of right to a dismissal.

On motion to dismiss or affirm.

OPINION.—Our jurisdiction of this case is clear. The appeal is not from the decree entered on our mandate at the last term in Hinckley *v.* Railroad Company, 100 U. S. 153. On the contrary, that decree has been satisfied by an actual payment of the amount found due. The case does not, therefore, come within the rule laid down in Stewart *v.* Salamon, 97 id. 361, where we held that an appeal would not be entertained from a decree rendered by the court below in accordance with our mandate on a previous appeal. The record now presented shows that after our decision at the last term, in which, among other things, Hinckley, the ap-

pellant, was allowed ten thousand dollars for his services as receiver from the time of his appointment in the Kelly suit, he went into the State court and had that suit reinstated. He then applied to that court to fix his compensation as receiver. That was done, and resulted in an allowance to him of something more than twenty-four thousand dollars. As soon as that order in his favor was made, he filed an intervening petition in the Circuit Court, asking that the amount so allowed him might be paid out of the fund in the Circuit Court belonging to the Morton suit. This was refused, and from the order to that effect, which was a final decree on the intervening petition, this appeal was taken. Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself. . . . This case comes clearly within that rule, and the motion to dismiss is, therefore, denied.

But we think the motion to affirm should be granted. The question of compensation to the receiver, so far as the fund in the Circuit Court is concerned, was settled on the former appeal. The allowance then made was for the entire services of the receiver from the date of his original appointment in the Kelly suit. The value of the services was made, by the exceptions to the master's report, a matter of special inquiry, and the result is indicated in the judgment which was then given. If the State court has funds in its hands, out of which its judgment can be paid, it has full power to order the payment, but the liability of the fund in the Circuit Court to the receiver has already been fully discharged. The court below was right, therefore, in refusing the prayer of the appellant in his intervening petition, and its order to that effect is *Affirmed.*

Further, on petition for rehearing.

Rule 6, par. 4, as amended November 4th, 1878, 97 U. S. vii, provides that there may be united with a motion to dis-

miss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. This is a modification of the rule as originally promulgated May 8th, 1876, 91 U. S. vii, when it was confined to motions to dismiss writs of error to a State court. In Whitney *v.* Cook, 99 U. S. 607, we held that to justify a motion to affirm under this rule there must be a motion to dismiss and at least some color of right to a dismissal.

In Stewart *v.* Salamon, 97 U. S. 361, we decided that if an appeal was taken from a decree entered on our mandate upon a previous appeal, we would, on the application of the appellee, examine the decree entered, and if it conformed to the mandate, dismiss the case, with costs. The motion to dismiss in this case was apparently based upon that ruling. It seemed to us, when it was up for hearing, to have been made in good faith; and while we did not think it ought to be sustained, we could not say that it was without any color of right. For that reason we felt at liberty to look into the motion to affirm.

The record in this case showed that Hinckley was appointed receiver in the Kelly suit November 24th, 1869, and that his receivership ended by his turning over the property to the trustees of the mortgage on the 12th of August, 1875. The record of the former appeal, to which we think we may with propriety look, as the order now appealed from was made upon a petition of intervention filed in that cause, shows that in the settlement of accounts then made Hinckley was paid for his services during the whole period of his receivership, that is to say, from the date of his appointment in the Kelly suit until his final discharge.

We are still of the opinion that the case is a proper one

for the application of our rule in respect to motions to affirm, and, therefore, the petition for a rehearing is

Denied.

RAILWAY CO. *v.* RENWICK, 102 U. S. 180.

FEDERAL QUESTION—EMINENT DOMAIN—RIPARIAN OWNER—COMPENSATION FOR PROPERTY APPROPRIATED.

A railroad company cannot, by virtue of a grant of a State legislature, appropriate the property of a riparian owner on the Mississippi River, which he uses in connection with the river, without just compensation.

On motion to dismiss or affirm.

OPINION.—Although the Supreme Court of Iowa decided that Congress, under the power to regulate commerce, had jurisdiction over the Mississippi River, and having exercised that power in the way specified in § 5254 Rev. Stat., all State legislation in conflict therewith was void, still the question remains, whether, if a riparian proprietor improves his property with a view to its use in connection with the river, without complying with this act of Congress, a railroad company, under the power of eminent domain granted by the State, can appropriate his improvements to its own use without his consent and without making him compensation. This, we think, is a Federal question giving us jurisdiction, but it is a question on which we do not care to hear argument. The controversy is not between the public and the riparian owner as to his right to keep up his improvements The public does not complain, but the railroad company wants the improvements. In the hands of the company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties the improvements are the property of the riparian proprietor, and if the company wants them for its own use it must make compensation. So the court

below has decided, and to our minds its decision was clearly right. While in Iowa it has been held that the State owns the lands lying along the river between high and low water mark, care was taken in the Act of March 18th, 1874, to provide that it should not be lawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and river without compensation to the shore owners. The second section of the act is good, even though the first may conflict with what Congress had before done.

The motion to dismiss is denied, but that to affirm is granted. *Judgment affirmed.*

SCHOONMAKER *v.* GILMORE, 102 U. S. 118.

ADMIRALTY—JURISDICTION OF THE U. S. COURTS IN, IN PERSONAM.

The decision below being in accordance with precedents of this court, a motion to affirm is granted.

On motion to dismiss or affirm.

OPINION.—The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in The Moses Taylor, 4 Wall. 411; The Hine *v.* Trevor, id. 555; The Belfast, 7 id. 624; Leon *v.* Galceran, 11 id. 185; and Steamboat Company *v.* Chase, 16 id. 522. The Judiciary Act of 1789 (1 Stat. 73, § 9), reproduced in § 563 Rev. Stat., par. 8, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to

give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied.

The motion to dismiss is overruled, and that to affirm granted. *Judgment affirmed.*

MOORE *v.* SIMONDS, 100 U. S. 145.

AMENDMENTS—APPEAL—PARTNERSHIP—NAME OF, IN APPEALS.

An unacknowledged mortgage of a vessel, not recorded, is not invalid as against third parties having actual notice.

On motion to dismiss or affirm.

OPINION.—Technically, this appeal should have been taken in the names of the individual members of the commercial firm of John T. Moore & Co., instead of in the name of the firm, and because of such an irregularity an appeal was dismissed in the case of The Protector, 11 Wall. 82. That case was decided before the Act of June 1st, 1872 (17 Stat. 197, § 3, now § 1005 Rev. Stat.), allowing amendments of writs of error in certain cases, and it does not appear that the defect could have been remedied by reference to anything in the appeal papers. Here, however, § 1005 was in force when the appeal was taken, and the bond shows that the firm in whose favor the appeal was allowed was composed of John T. Moore and John T. Moore, Jr. We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for that reason we will not dismiss the appeal. But on looking into the record we find that the only question involved is whether the lien of the appellants' mortgage on the steamboat "John T. Moore" is superior to that of another mortgage in favor of Swift's Iron and Steel Works, and Dennis Long. From the findings of fact it appears that the last-named mortgage was executed January 27th, 1871; that it was signed and acknowl-

edged by the owner of the boat in the presence of two witnesses, one of whom was a notary public; that the witnesses attested the execution of the mortgage, but the notary did not sign officially; that there was no other or further acknowledgment of the mortgage before a notary; and that this mortgage was not recorded in the office of the collector of customs where the boat was permanently enrolled. The mortgage to Moore & Co., the appellants, was executed January 3d, 1872, and was duly recorded in accordance with the act of Congress; but when it was taken Moore & Co. had actual notice of the existence of that to the appellees. Upon this state of facts the court below held that the mortgage of the appellants was inferior in lien to that of the appellees; and this was so clearly right that we are not inclined to hear an argument upon the question.

The act of Congress relied on by the appellants is now found in §§ 4192 and 4193 of the Revised Statutes. These, so far as they are material to the present inquiry, are as follows:

"§ 4192. No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. . . .

"§ 4193. . . . But no bill of sale, mortgage, hypothecation, or conveyance, or discharge of mortgage, or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds."

To our minds there is no doubt that Congress only intended to require that a mortgage on a vessel should be

acknowledged for the purpose of authenticating it for record, and that as between the parties and as against persons having actual notice thereof, it was valid without acknowledgment or record. As this was the decision of the court below, we deny the motion to dismiss, and grant that made under Rule 6, to affirm. *Decree affirmed.*

KETCHUM *v.* BUCKLEY, 99 U. S. 188.

FEDERAL QUESTION.

This court has so often held that the same general form of government, general law for administration of justice, and protection of private rights, which existed in the States prior to the rebellion, remained during its continuance and afterward, that it is unwilling to hear argument as to liability upon a testamentary bond made pursuant to such laws.

On motion to dismiss or affirm.

OPINION.—We are not willing to hear an argument on the only possible Federal question presented by this case. It is now settled law in this court that during the late civil war the same general form of government, "the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterward. As far as the acts of the States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." . . . The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf. It is not alleged that the governor, after his

appointment, undertook by any positive act to remove McGuire from the position he occupied as general administrator, or that McGuire himself at any time ceased to perform the duties of his office by reason of what was done by the President or others toward the restoration of the State to its political rights under the Constitution of the United States. From all that appears in the record he continued to act during the whole of his term as general administrator of the county, notwithstanding the changes that were going on in the other departments of the State government. Under these circumstances, it is so clear that the judgment of the court below was right that we grant the motion to affirm. *Judgment affirmed.*

TRANSPORTATION LINE *v.* COOPER, 99 U. S. 78.

FEDERAL QUESTION.

Where the only Federal question is as to whether or not a canal-boat carrying the wife and children of the captain is a "barge carrying passengers," this court declines to hear argument, and affirms the judgment.

On motion to dismiss or affirm.

OPINION.—The only Federal question presented in this case is one upon which we are not inclined to hear an argument. A canal-boat laden with coal for transportation, having on board the wife and children of the captain, is not "a barge carrying passengers," within the meaning of § 4492 Revised Statutes, which requires such a barge, while in tow of a steamer, to be provided with "fire-buckets, axes, life-preservers, and yawls." The motion to dismiss is denied, but that to affirm is granted.

Judgment affirmed.

LOWE *v.* WILLIAMS, 94 U. S. 650.

REMOVAL.

After a final hearing or trial in a State court, a petition for removal to a United States court cannot be granted. This court, having so held in several cases, grants a motion to affirm.

On motion to dismiss or affirm.

OPINION.—The Act of March 2d, 1867, 14 Stat. 558, provided for the removal of causes from the State courts to the Circuit Courts, under certain circumstances, when due application was made "before the final hearing or trial of the suit." This we held in Stevenson *v.* Williams, 19 Wall. 575, to mean "before final judgment in the court of original jurisdiction where the suit is brought." To the same effect are Vannever *v.* Bryant, 21 id. 43, and Fashnacht *v.* Frank, 23 id. 419, decided since. The Act of March 3d, 1875, 18 Stat. 471, under which the removal was attempted in this case, requires the petition to be filed "before the final trial." The decisions under the Act of 1867 are, therefore, equally applicable to that of 1875. The petition for removal was filed in the appellate court, and, of course, long after the final judgment in the court of original jurisdiction.

Under these circumstances, we consider that, while a Federal question is presented by the record, it is one that has already been settled and needs no further argument.

The motion to dismiss denied; that to affirm granted.

ST. LOUIS *v.* MYERS, 113 U. S. 566.

FEDERAL QUESTION—RIPARIAN RIGHTS.

A suit by a lessee of property in St. Louis used in connection with the navigation of the Mississippi River, against the city for diverting the natural course of the water and destroying appurtenant water privileges, presents no Federal question.

Motion to dismiss granted.

OPINION.—The question on which this case turned below was, whether Myers, the lessee of property situated on the bank of the Mississippi River within the city of St. Louis, which had been improved with a view to its use, and was used in connection with the navigation of the river, could maintain an action against the city for extending one of its streets into the river so as to divert the natural course of the water and destroy the water privileges which were appurtenant to the property. The Supreme Court of the State decided that he could; and to reverse that decision this writ of error was brought. We are unable to discover that any Federal right was denied the city by the decision which has been rendered. The act of Congress providing for the admission of Missouri into the Union, Act of March 6th, 1820, ch. 22, 3 Stat. 545, and which declares that the Mississippi River shall be "a common highway and forever free," has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of State law. Certainly there is nothing in the provisions of the act from which a right can be claimed by the city of St. Louis, even though it be the owner of the bed of the river, to change the course of the water as it flows, to the injury of those who own lands on the banks. This act was not mentioned in the pleadings, and, so far as we can discover, it was not alluded to in the opinions of either of the courts below, except for the purpose of showing that the Mississippi River was in law a navigable stream. By an act passed June 12th, 1866, ch. 116, § 9, 14 Stat. 63, Congress relinquished to the city of St. Louis all the right, title, and interest of the United States, "in and to all wharves, streets, lanes, avenues, alleys, and of the other public thoroughfares" within the corporate limits; but this did not, any more than the act providing for the admission of Missouri into the Union,

purport to authorize the city to impair the rights of other riparian proprietors by extending streets into the river, and neither in the court below nor here has there been any provision referred to which it is claimed has that effect.

The case of Railway Co. *v.* Renwick, 102 U. S. 180, was entirely different from this. There the question was whether the owner of a saw-mill on the bank of the Mississippi River, who had improved his property by erecting piers and cribs in the river under the authority of a statute of Iowa, but without complying with the provisions of § 5254 Revised Statutes, could claim compensation from the railroad company for taking his property in the river for the construction of its road. The company claimed that, as Congress, in the exercise of its jurisdiction over the navigable waters of the United States, had prescribed certain conditions on which the owners of saw-mills on the Mississippi River might erect piers and cribs in front of their property, the statute of Iowa, under which Renwick had made his improvements, was void. This, we held, presented a Federal question and gave us jurisdiction; but nothing of that kind appears in this record.

On the whole we are satisfied that no case has been made for our jurisdiction, and

The motion to dismiss is granted.

ST. PAUL, ETC., R. R. Co. *v.* WINONA, ETC., R. R. Co., 112 U. S. 721.

FEDERAL QUESTION.

The rights asserted by both parties being founded upon acts of Congress which require construction, a motion to dismiss is denied.

Motion to dismiss denied.

OPINION.—This is a writ of error to the Supreme Court

of the State of Minnesota, and a motion is made to dismiss it for want of jurisdiction.

It will sufficiently appear in the opinion on the merits, that the rights asserted by both parties are founded on acts of Congress, and require the construction of those acts to determine their conflicting claims. The motion to dismiss, therefore, cannot prevail.

GRAME, EXECUTOR, *v.* MUTUAL ASSURANCE COMPANY; GODDIN, EXECUTOR, *v.* SAME, 112 U. S. 273.

FEDERAL QUESTION—FIRE INSURANCE.

A suit on a policy for the destruction of property which caught fire from contiguous property burned by order of the Confederate authorities on the evacuation of Richmond—the policy expressly excepting losses resulting from riots, civil commotions, insurrections, or invasions of a foreign enemy—does not present a Federal question.

Motion to dismiss granted.

OPINION.—We have no jurisdiction in these cases. The suits were brought on policies issued by the Mutual Assurance Society of Virginia, one to John Grame and the other to Seymour P. Vial, insuring certain buildings of the respective parties against such losses or damages as might be occasioned by accidental fire or lightning, but expressly excepting from the risks, losses which resulted from riots, civil commotion, insurrections, or from the invasion of a foreign enemy. The defense was that the loss was not occasioned by an accidental fire, but that it resulted from a fire purposely set by the Confederate authorities on the evacuation of Richmond, in April, 1865, as a war measure, for the destruction of tobacco and military stores which were liable to capture by the forces of the United States. Neither party set up or claimed in the pleadings "any title, right, privi-

lege, or immunity . . . under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

On the trial it was conceded that the buildings were destroyed in the progress of a fire purposely set by the order of the Confederate States government on the evacuation of Richmond, "in pursuance of its laws and policy to destroy military stores and tobacco which were liable to capture by the forces of the United States." The buildings insured were not actually set on fire by the Confederate authorities, but they caught from a fire that was so set.

On these facts the Supreme Court of Appeals of Virginia decided that the society was not liable under its policies. In the opinion filed the court said: "It is plain that this fire, from which the appellants' buildings were burned, resulted from the act of these military officers, acting under express orders and by virtue of an act of Congress of the Confederate States of America. Certainly it cannot be said that the fire which consumed the buildings of the appellants was an accidental fire or a fire by lightning. The question is, how did such fire result and how was it occasioned? If it was occasioned by accident or by lightning, the company is responsible. It is not responsible if occasioned by or resulting from riots, insurrection, civil commotion, or the invasion of a foreign enemy." Then, after considering the facts, it is further said: "I suppose that 'civil commotion' must necessarily arise where there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think no man who lived in the late decade would say that there was no civil commotion between 1861 and 1865. But the company not only protected itself against liability for loss occasioned by riots, insurrection, and civil commotions, but against the 'invasion of a foreign enemy.' In the light of history and of facts, familiar to every man who opens his

eyes and sees material facts before him, is it not plain that the late war was a war of invasion, and that it was the invasion of an enemy, and that it was the invasion of 'a foreign enemy?'" And again: "Now, many authorities and opinions might be quoted to the same effect, but, I think, those already referred to are sufficient to show that the Confederate States of America were, certainly as long as the war lasted, a separate and independent government and foreign to the United States of America."

It is upon these expressions in the opinion of the court, and others like them, that our jurisdiction is supposed to rest, but it must be borne in mind that the only question for decision was whether the society was liable on its policies for losses which resulted from such a fire as that in which the insured buildings were destroyed. The inquiry was not as to the rights of the respective parties under the Constitution and laws of the United States, but as to what was meant by certain words used in the contracts they had entered into; not whether secession was constitutional, and the Confederate government, which grew out of it, a lawful government, having authority to order the fire to be set; but whether that government did so order, and, if it did, whether the fire which followed was a fire which resulted from civil commotion, insurrections, or the invasion of a foreign enemy within the meaning of those terms as used in the policies sued on; not whether the entry of the forces of the United States into Richmond was in fact the invasion of a foreign enemy, but only whether it was so in its legal effect upon the rights of the parties under their contracts. These are clearly questions of general, not Federal, law, and such being the case, the decision of them by the Court of Appeals is not reviewable here. *The motions to dismiss are granted.*

ADAMS CO. *v.* BURLINGTON, ETC., R. R. CO., 112 U. S. 123.

FEDERAL QUESTION.

Where the decision of a State court rested upon a non-federal question, this court has no jurisdiction, though there may also have been a Federal question raised.

Motion to dismiss granted.

OPINION.—This is a suit in equity brought by Adams County, Iowa, the plaintiff in error, on the 23d of December, 1869, against the Burlington and Missouri River Railroad Company, in a State court of Iowa, to quiet its title to sixty-six forty-acre tracts of land. The county asserts title under the swamp-land act of September 28th, 1850, 9 Stat. 519, ch. 84, and the railroad company under the Iowa land grant act of May 15th, 1856, 11 Stat. 9, ch. 28. The company, in its answer, denied the title of the county, on the ground that the lands were not swamp lands within the meaning of the swamp-land act, and took issue on every material averment of fact in the bill to support a title under that act. It then set up its own title under the land grant act. The petition averred a selection of the lands in dispute, as swamp lands, by Walter Trippett, county surveyor of the county, under the authority of the Secretary of the Interior and Commissioner of the General Land Office, as well as the Governor and Legislature of Iowa, and the report thereof, in due form, to the Commissioner of the General Land Office, on the 30th of September, 1854. On account of this selection and report, it was claimed that the right of the State to a patent for the lands selected was perfected by the Act of March 3d, 1857, ch. 117, 11 Stat. 251. The railroad company filed an answer in the nature of a cross-bill asking for affirmative relief on the following facts:

"Petitioner further states that on the 25th day of October, 1861, the claim or right of said plaintiff to said lands, under

and by virtue of said pretended selection of said Trippett, was submitted to the Commissioner of the General Land Office for final adjudication, and defendant appeared before said commissioner and resisted the claims of said plaintiff to said lands, and asserted its rights thereto as lands granted to the State of Iowa for railroad purposes, and said commissioner, after full and careful examination of the plaintiff's claim, rejected the same as fraudulent and unfounded, and afterward, on the 25th of October, 1862, said commissioner certified and conveyed said lands to the State of Iowa for railroad purposes, under and in pursuance of act of Congress of date of May 15th, 1856. . . . And that on the —— day of ——, the said State certified and conveyed the same to defendant in pursuance of the said act of the legislature of the said State of date of ———, 1856. . . . Defendant here avers the fact to be that the said plaintiff, well knowing that her claims to said lands were fraudulent and unfounded, did, upon the said decision of the said commissioner against her, voluntarily abandon all claim, right, or interest in said lands, and has since the date of such decision and up to the time of the commencement of this suit, recognized and treated defendant as the owner of said lands; that the said county of Adams, since the 25th day of October, 1861, has, by numerous and repeated acts, not only abandoned all claims to said lands, but has recognized, treated, and acknowledged the same to belong to defendant; that since the date of said decision said county has regularly each year (up to and including the year 1871) listed and assessed said lands as the land of the defendant, and has, since the date aforesaid, regularly levied and collected taxes thereon from defendant. That the taxes thus levied and collected on said lands from defendant since the 25th day of October, 1861, would, with the legal interest thereon, amount to about ten thousand dollars. That prior to the 25th of October, 1861, the county had assumed to contract portions of said land to certain in-

dividuals under the pre-emption laws, and some of said pre-emptors had taken possession of said land and made valuable improvements thereon, but that plaintiff, after that date, ceased to take any further notice or control of said land, or attempt in any manner to fulfill their said agreement with said pre-emptors; and relying upon their title to said lands, and having every reason to believe, from the acts and conduct of the plaintiff, that she had acquiesced in the decision of said commissioner, and abandoned all claims to said lands, defendant contracted with said pre-emptors, and with the knowledge of the plaintiff, and without any objections being made by said plaintiff, defendant sold and conveyed by warranty deed parcels of said land aforesaid, and defendant afterward, and before the commencement of this suit, sold and conveyed by warranty deed these portions of said land to different persons, many of whom are now, and for the last six years have been, in the actual possession of the same, and have made valuable improvements thereon. That on the 17th day of June, 1869, the said plaintiff, for the purpose of inducing defendant to bring said lands into market, made and entered into a written contract, whereby she expressly recognized defendant's ownership of said lands, and agreed, in consideration of defendant's bringing said lands into market, and selling the same to settlers, to remit a portion of the taxes that she had levied thereon, and defendant then and there paid to said county the sum of ten thousand dollars, as taxes on certain lands, including the land in controversy."

The prayer was "that plaintiff's bill may be dismissed, and that defendant have and obtain a decree and judgment quieting their title to said lands, and for costs of this case;" and if the title of the defendant was not sustained, that there might be a judgment in favor of the defendant and against the county for the taxes that have been paid on the land.

Under these pleadings testimony was taken, and the cause

heard in the court of original jurisdiction, where, on the 8th of May, 1878, a decree was rendered dismissing the plaintiff's bill, and "finding that the allegations of defendant's cross-bill are true, and that the defendant is entitled to the relief prayed for; that the lands in controversy . . . were duly certified to the defendant as land inuring to it, as alleged in the cross-bill; that the defendant became thereby the legal owner of said lands, as alleged in the cross-bill; that the plaintiff has, since 1862, recognized and treated said defendant as the owner of said land, as alleged in said cross-bill; and plaintiff is now, by such acts and conduct, estopped from claiming the same or denying the defendant's title thereto."

Upon this finding, the decree established the title of the company, and quieted it as against the claim of the county.

From this decree an appeal was taken to the Supreme Court of the State, where, on the 24th of October, 1879, it was affirmed. Thereupon, the county presented to the chief justice of the Supreme Court a petition for the allowance of a writ of error to this court. In this petition, it was stated that "in the pleadings, record, judgment, and decree . . . there was drawn in question the rights" of the county under the swamp-land act and the Act of March 3d, 1857, as well as the construction of the acts making the railroad grant, and that the decision was against the right claimed by the county. In his certificate of allowance of the writ, the chief justice stated that he found from the record that the "facts stated in the petition are true." The case was several times considered by the Supreme Court before the final judgment of affirmance was rendered, and the record contains four opinions, filed at different times in the course of the proceeding, from which it appears, in the most positive manner, that the decision of the cause in favor of the company was placed entirely on the ground of estoppel, as

set up in the cross-bill. The original title of the county is nowhere, in any of the opinions, disputed or denied.

A motion is made to dismiss the writ to this court for want of jurisdiction on the ground that no Federal question is involved.

To give us jurisdiction of a writ of error for the review of a judgment of a State court, it must appear affirmatively, not only that a Federal question was raised and presented for decision to the highest court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous. Murdock *v.* Memphis, 20 Wall. 590, 636; Chouteau *v.* Gibson, 111 U. S. 200. This record shows that there were two questions presented by the pleadings, to wit:

1. Whether the county acquired a title in equity to the lands in dispute under the operation of the swamp-land act, supplemented as it was by the Act of March 3d, 1857; and,

2. Whether, if it did, it was estopped by its subsequent acts from setting up that title as against the railroad company.

It may be conceded that the first of these questions was Federal in its character, but we are clearly of opinion the second was not. A consideration of no act of Congress was involved in its decision. There was nothing in the swamp-land grant to prevent the county from surrendering the property to the railroad company, if that was thought best. Under this defense the validity of the original title was not disputed. The claim was that, in legal effect, that title had been ceded to the railroad company, and that the county was in no condition to demand it back. There was no dispute about the Federal right itself, but about the consequences of what had been done by the parties in respect to it, after

the title had passed in equity from the United States to the county.

To our minds, for the purposes of the present question, the case is, in all respects, the same as it would be if the dispute had been about the effect of an instrument intended as a conveyance of the property from the county to the company. The controversy is not as to the right to convey, but as to the effect of what has been done to make a conveyance. That depends not on Federal, but on State law.

It is contended, however, that inasmuch as the alleged compromise between the county and the company included, among other things, the claim of the county for taxes levied on the lands, the right to tax the lands before a patent was issued for them by the United States, must have been passed upon by the court below in the decision that was rendered. Clearly this is not necessarily so. The company claims nothing under the taxation. Its rights against the county do not depend on the validity of the taxes. The right to tax was one of the matters in dispute between the county and the company, and that was compromised with the rest. The effect of the compromise upon the title of the county would be the same whether the tax was properly levied or not. It follows, therefore, that the decision of the court below on this branch of the case did not involve the question of the validity of the title set up by the county under laws of the United States.

This brings us to the inquiry, whether it appears sufficiently that the case was disposed of below on this defense. If it does, the motion to dismiss must be granted, and, having no jurisdiction, we cannot pass on the correctness of that decision. The record discloses that this separate and distinct defense was made, and that it in no way depended on the validity or invalidity of the original title of the

county. In our opinion it is clearly to be inferred from the decree of the court of original jurisdiction, which was affirmed by the Supreme Court, that the decision in favor of the company was placed entirely on that ground. So far as the original bill of the county is concerned, the decree finds in favor of the company and dismisses the bill. Then, as to the cross-bill, it finds the legal title to be in the company, and that the county is estopped from claiming the lands or denying the company's title thereto. This, of itself, implies that there was, in fact, no decision against any right, title, privilege, or immunity claimed under the Constitution or laws of the United States, and that the decree rested alone on the defense of estoppel, which was broad enough to control the rights of the parties without disposing of the Federal question which it was attempted to raise. In other words, it was adjudged by the State court that the title of the company must prevail in this suit, because the county was precluded by its conduct from insisting to the contrary. But if we look to the opinions which, under the laws of Iowa, must be filed before a judgment is rendered, and which, when such is the law, may certainly be looked at to aid in construing doubtful expressions in the decree, it is shown unmistakably that the decision was put on that ground alone.

In the petition which was presented to the chief justice of the court for the allowance of a writ of error, it was stated "that in the pleadings, record, and judgment and decree, there were drawn in question" the rights of the county under the swamp-land acts as well as the construction of the land-grant acts, and that the judgment was against these rights. The chief justice, in his allowance of the writ, certified that he found the statements in the petition to be true, but if this certificate is to have any effect at all upon this question, it certainly cannot be taken as conclusive when the same chief justice, in an opinion on file

in the case, places the decision entirely on the ground of estoppel.

It follows that we have no jurisdiction, and

The motion to dismiss is granted.

SANTA CRUZ COUNTY SUPERVISORS *v.* SANTA CRUZ RAILROAD COMPANY, 111 U. S. 361.

FEDERAL QUESTION—PRACTICE.

A suit to require the commissioners of a county to deliver certain bonds claimed by the plaintiff under a contract, the defense resting on the construction to be given to certain State statutes, the constitutionality of which was not questioned, does not present a Federal question.

Motion to dismiss granted.

OPINION.—This was a suit brought by the Santa Cruz Railroad Company to require the board of commissioners of the county of Santa Cruz to deliver certain bonds, claimed to be due from the county under a contract with the railroad company. The defenses were, 1st, that the contract was unilateral, and, therefore, not binding on the county; 2d, that the board of supervisors exceeded its authority in making the contract; and 3d, that a repealing statute, passed after the contract was entered into, took away the power of the board to make any further deliveries of bonds. No objection whatever was made to the validity of the statute under which the board assumed to act in making the contract. The whole defense rested on the construction and effect to be given to certain statutes, which no one denied the constitutional power of the legislature to enact.

The ground of Federal jurisdiction, relied on in the brief of counsel for the county, is, that by the issuance of the bonds demanded in this proceeding, the State would deprive

the taxpayers of the county of Santa Cruz of property without due process of law, contrary to the right, privilege, or immunity secured by the first section of the Fourteenth Amendment of the Constitution of the United States.

That was not the question presented to or decided by the State court. In that court the inquiry was, whether the proceedings of the board to charge the county were according to law; not whether the law under which the proceedings were had was constitutional and binding on the taxpayers. The State court decided that the proceedings were in accordance with the requirements of the law, and thus created an obligation on the part of the county to deliver the bonds, which was not discharged by the repealing statute relied on. This decision involved no question of Federal law, and is not reviewable here. *The motion to dismiss is granted.*

SUSQUEHANNA BOOM COMPANY *v.* WEST BRANCH BOOM COMPANY, 110 U. S. 57.

FEDERAL QUESTION.

Judgments of State courts can be reviewed here only when the Federal question involved is raised in a manner to enable the court below to see that such question is necessarily involved in the decision. It is not sufficient to give this court jurisdiction, that the Federal question is raised by petition for a rehearing.

Motion to dismiss granted.

OPINION.—The Susquehanna Boom Company was incorporated by the General Assembly of Pennsylvania on the 26th of March, 1846, and as early as 1849 erected, under its charter, a boom in the West Branch of the Susquehanna River, at Williamsport, for the purpose of securing logs and other lumber floating in the river. Its charter did not purport to confer upon it any exclusive rights to the use of the river above the boom for bringing logs down.

On the 26th of March, 1849, the West Branch Boom Company was incorporated to construct and maintain a boom on the south side of the West Branch at Lock Haven, about twenty-five miles above Williamsport. Under its charter this company was not allowed to extend its boom more than halfway across the river, but it could "erect such piers, side branches, or sheer booms," as might be necessary. With this authority a sheer boom was constructed in the north half of the stream. This suit was begun in a State court of Pennsylvania, to enjoin the West Branch Company from maintaining such a sheer boom, on the ground that under its charter no such structure could be placed by it on the north side of the branch. The Supreme Court of the State, on appeal, decided that it could put in and maintain such a sheer boom, and adjudged accordingly. To reverse that judgment this writ of error was brought. The West Branch Company now moves to dismiss the writ because no Federal question is involved.

It is clear to our minds that we have no jurisdiction. The Constitution protects State corporations in such contracts with the State as their charters imply. The Susquehanna Company, whose rights are involved, was given full authority to erect and maintain its boom at Williamsport. That undoubtedly implied the right to use the river as others used it for bringing logs to the boom. The West Branch Company was also authorized to construct its boom in the south half of the river at Lock Haven. Whether it could, under its charter, put a sheer boom in the north half seems to have been a question with the Susquehanna Company, and this suit was brought to have that question settled. That is clearly all there was in the case up to the time of the final decision of the Supreme Court, whose judgment we are now called on to review. There is nowhere, either in the pleadings, the evidence, or the suggestions of counsel, prior to the judgment, so far as we have been able to discover, even an

intimation that the Susquehanna Company claimed any contract right, under its charter, to exclude the West Branch Company from such use as that company was making of the north half of the stream. The only controversy apparently was about the right of the West Branch Company, under its charter, to such use at all.

"Certainly," as was said in Brown *v.* Colorado, 106 U. S. 95, "if the judgments of the courts of the States are to be reviewed here on such" [that is to say Federal] "questions, it should only be when it appears unmistakably that the court either knew, or ought to have known, that such a question was involved in the decision to be made."

The fact that on a petition for rehearing it was suggested that if the charter of the West Branch Company was so construed as to give it the right to maintain its sheer boom in the north half of the stream, that charter would impair the obligation of the contract of the State with the Susquehanna Company, is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests. *The motion to dismiss is granted.*

CROSSLEY *v.* CITY OF NEW ORLEANS, 108 U. S. 105.

FEDERAL QUESTION.

Where, in a State court, the Federal question raised was not, and need not have been, decided, but the case was decided on non-federal questions, this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—The record shows that the defendants in error

sought to enjoin the collection of a judgment against their property to enforce an assessment under the drainage laws of Louisiana: 1, because under the operation of the laws authorizing the judgment nothing more remained to be paid thereon; and, 2, because the judgment had, in terms, been released and discharged by certain acts of the general assembly of the State passed in 1877 and 1878. If the case was decided below on the first of these grounds, no Federal question is involved.

It was settled long ago that, in cases coming to this court from the Supreme Court of Louisiana, the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one we have authority to review. . . . From the statement of the case and the opinion found in this record, it is manifest the decision was placed entirely on the ground that the judgment was not collectible under the law as it stood before the acts of 1876 and 1877 were passed. Consequently the case was disposed of before the Federal question presented by the pleadings was reached, and that question was not and need not have been decided. Under these circumstances we have no jurisdiction, and the *Motion to dismiss is granted.*

MILLER *v.* LANCASTER BANK, 106 U. S. 542.

FEDERAL QUESTION—PARTY IN INTEREST.

This court will dismiss a writ of error to a State court, though a Federal question be involved, if the right claimed was not for the party claiming it, but was the title of another set up by way of defense.

Motion to dismiss granted.

OPINION.—From this record it appears that one S. W. Miller, being insolvent, made an assignment of his property to M. J. Durham, trustee, for the benefit of his creditors. The trustee afterward instituted a suit in the Boyle Circuit

Court of Kentucky to enforce his trust. To this suit S. D. Miller and E. B. Miller, two of the present appellants, were parties; and in due course of proceeding a decree was entered for the sale of the assigned property. In this decree it appears that S. D. Miller and E. B. Miller, who were then in possession of part of the premises under a lease, were permitted to hold until the 31st of December, 1880, but it was added: "Said S. D. Miller and Ed. B. Miller agree to give said trustee the full, entire, and peaceable possession of the house and lands they use and occupy, on or before the 31st day of December next, and on their failure so to do, the trustee, Durham, may have a writ of *habere facias possessionem* against each of them, and the clerk of this court is hereby directed to issue the same."

Under this decree the property now in question was sold and duly conveyed to the First National Bank of Danville. The Danville Bank afterward sold and conveyed the property to the National Bank of Lancaster, a bank organized under the national banking law. . . . After these conveyances were made, a writ was applied for under the decree, in behalf of the Lancaster Bank, and issued to John Meyer, sheriff of the county, commanding him to take the possession of the property from S. D. Miller and E. B. Miller, and deliver it to Durham, the trustee. Thereupon S. D. Miller, E. B. Miller, and John W. Miller, the last of whom had in some way got into possession of the property after the decree, filed a petition in the Boyle Circuit Court against the Lancaster Bank and the sheriff, to enjoin the execution of the writ, on the ground that it was issued without authority and was void. In this petition it was alleged that the Lancaster Bank had no power under its charter to take and hold the property, and that consequently the deed to it was inoperative and void. There were also allegations of irregularity in the form of the writ, and that since the decree, Durham, the trustee, had sold and conveyed the property to the Dan-

ville Bank. To this petition the Lancaster Bank filed an answer and counter-claim. In the counter-claim the bank set up its title through the sale under the decree. The prayer was that the petition of the plaintiffs be dismissed, and a judgment rendered for the recovery of possession. Upon the hearing the writ which had been issued was set aside for irregularity, but a new writ was awarded the bank. From a judgment to that effect an appeal was taken to the Court of Appeals of Kentucky, where the judgment was affirmed. To reverse this judgment of affirmance the present writ of error was brought.

Our jurisdiction depends on the question whether the plaintiffs in error have been denied by the judgment below any "title, right, privilege, or immunity specially set up or claimed" under the banking act. As early as 1809 it was held by this court in Owings *v.* Norwood's Lessee, 5 Cranch, 344, that in order to give us jurisdiction in this class of cases, the right, title, or immunity which is denied, must grow out of the Constitution, or a treaty or statute of the United States relied on. Under this rule jurisdiction was not taken in that case, although it was an action of ejectment by Norwood's lessee, and the record showed that an effort was made to defeat the recovery because of an outstanding title in a third person adverse to Norwood and protected by a treaty. Mr. Chief Justice Marshall, in speaking for the court, said: "Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the States, and whoever may have this right is to be protected. But if the person's title is not affected by the treaty, or if he claims nothing under a treaty, his title cannot be protected by the treaty." The principle thus announced has been recognized in many cases since. . . . Henderson *v.* Tennessee, 10 How. 311, like Owings *v.* Norwood's Lessee, was an action of ejectment, and the effort was to defeat the recovery by showing an outstanding title

in a third person under a treaty with which the party in possession did not connect himself; but the jurisdiction was denied, Mr. Chief Justice Taney saying, in the opinion: "The right to make this defense is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger in bar of the action. It is true the title set up in this case was claimed under a treaty. But to give jurisdiction to this court the party must claim the right for himself, and not for a third person in whose title he has no interest." And in Hale *v.* Gaines, 22 How. 144, it was said: "The plaintiff in error must claim (for himself) some title, right, privilege, or exemption under an act of Congress, etc., and the decision must be against his claim to give this court jurisdiction. Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject in litigation."

In our opinion these cases are conclusive of the present motion. The plaintiffs in error set up no title against the bank. In effect, they seek to prevent the issue of an execution on a judgment against them, or those under whom they claim, because, as between the Danville Bank and the Lancaster Bank, a conveyance made by the Danville Bank of the property to be delivered under the execution is inoperative on account of the provisions of the banking law. What was done between the two banks had no effect on the title of the parties in possession, and it was a matter of no importance to them whether the execution issued on the application of the one or the other. Clearly, therefore, the plaintiffs in error occupy no other position than that of parties setting up title in the Danville Bank by way of defense, and that is not claiming for themselves any title, right, privilege, or immunity given by the law. *Motion granted.*

BOUGHTON *v.* EXCHANGE BANK, 104 U. S. 427.

FEDERAL QUESTION.

To give this court jurisdiction to review a judgment from a State court, the record must show affirmatively, or by fair implication, that some Federal question was involved which was necessary to the determination of the cause.

Motion to dismiss granted.

OPINION.—To give us jurisdiction for the review of a judgment of a State court, the record must show affirmatively, or by fair implication, that some Federal question was involved which was necessary to the determination of the cause. The defense set up in this case was that the notes sued on were void for usury under the laws of New York, where they were made. Judgment was given against the plaintiff in error for want of a sufficient affidavit of defense. This judgment would be right if the affidavit was not such as was required by law or the practice of the court for the presentation of a defense like that relied on. As it is incumbent on him to show by the record, not only that this was not the ground of the decision below, but that some wrong determination of a Federal question was—and it has not been done—we might dismiss the suit without further examination; but on looking into the opinion which has been sent up with the record, we find that the Court of Appeals based its judgment, which alone we can review, entirely on the fact that the affidavit was not sufficiently specific in its averments to meet the requirements of the rules of pleading applicable to such cases.

It is clear, therefore, that we have no jurisdiction.

Motion granted.

POPPE *v.* LANGFORD, 104 U. S. 770.

FEDERAL QUESTION.

A decision as to the effect of adverse possession of lands for a period which would be a bar to a recovery in ejectment, does not present a Federal question.

Motion to dismiss granted.

OPINION.—It is clear we have no jurisdiction in this case. All the court below decided was, that in California the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment. This is not a Federal question. All that was said about § 1007 of the Civil Code of California was unnecessary and not required in the determination of the cause. *Motion granted.*

LANG *v.* BENEDICT, 99 U. S. 68.

FEDERAL QUESTION—DAMAGES.

A suit for damages against a judge who pronounced an illegal judgment of imprisonment, does not present a Federal question.

Motion to dismiss granted.

OPINION.—In *Ex parte* Lange, 18 Wall. 163, we decided that the present plaintiff in error must be discharged from imprisonment, because the sentence under which he was held was not authorized by law. In the present case the Court of Appeals of New York held that even though such was the law the defendant in error is not liable in damages for the false imprisonment, because, in pronouncing the judgment under which the imprisonment was had, he acted as a judge, in his judicial capacity, and not so entirely in excess of his jurisdiction as to make it the arbitary and unlawful

act of a private person. This is not a Federal question, and it was the only question decided.

The writ must, therefore, be dismissed for want of jurisdiction; and it is *So ordered.*

BANK *v.* MCVEIGH, 98 U. S. 332.

FEDERAL QUESTION—COMMERCIAL LAW—NOTICE OF PROTEST.

The decision below being "upon principles of general law alone," raising no Federal question, the writ of error is dismissed.

Motion to dismiss granted.

OPINION.—The motion to dismiss this case for want of jurisdiction will be granted upon the authority of Bethell *v.* Demaret, 10 Wall. 537; Delmas *v.* Insurance Company, 14 id. 661; Tarver *v.* Keach, 15 id. 67; Rockhold *v.* Rockhold *et al.*, 92 U. S. 129; New York Life Insurance Co. *v.* Hendren, id. 286. All the court below decided was, that by the general principles of commercial law, if during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured. It is true that, upon a former decision of the same cause, something was said in the opinion of the Court of Appeals as to the effect of the ordinance of secession of Virginia upon the rights of the parties, and that upon the last trial in the Corporation Court an effort was made by the plaintiff in error to obtain a ruling upon the constitutionality of that ordinance; but it is equally true that the Corporation Court declined to rule at all upon the question, and that the Court of Appeals, in the opinion filed with the

judgment brought here for review, says: "The court before refused to give any opinion on the constitutionality of the ordinance of secession, as it does now, such question being irrelevant and not involved, as we think, in the decision of the cause. The decision of this court would be the same, whether it held the said ordinance of secession to be constitutional or unconstitutional." A careful examination of the record satisfies us of the correctness of this statement. The case was decided "upon principles of general law alone," and it nowhere appears in the record that the plaintiff in error set up or claimed any "title, right, privilege, or immunity" under the Constitution or authority of the United States, which was denied him by the decision below.

Writ dismissed.

McSTAY *et al. v.* FRIEDMAN, 92 U. S. 723.

FEDERAL QUESTION.

Where, in ejectment for land confirmed to a city by an act of Congress, the parties rely upon questions not involving the congressional act, this court has no jurisdiction to review the judgment of a State court.

Motion to dismiss granted.

OPINION.—This was an action of ejectment brought by Friedman to recover the possession of a certain parcel of the Pueblo lands, confirmed to the city of San Francisco by the act of Congress passed March 8th, 1866 (14 Stat. 4). He did not attempt to connect himself with the city title, but relied entirely upon his alleged prior possession and that of his grantors. The defendants, who are the plaintiffs in error, set up in their answer as defenses (1), adverse possession, with specifications to bring themselves within the operation of the Statute of Limitations; and (2) the title of the city of San Francisco under the act of Congress, and an assignment of that title to themselves, pursuant to the

provisions of an ordinance of the city and an act of the legislature of California.

At the trial no question was raised as to the validity or operative effect of the act of Congress. The effort on the part of the plaintiffs in error seems to have been (1) to establish their defense under the Statute of Limitations; and (2) to prove such possession as would, according to their claim, transfer the city title to them, under the operation of the city ordinance and the act of the legislature.

No Federal question was involved in the decision of the Supreme Court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the "Constitution or any treaty or statute of, or commission held or authority exercised under, the United States." The case is, therefore, in all essential particulars like that of Romie *et al. v.* Casanova, 91 U. S. 379; and the writ must be *Dismissed for want of jurisdiction.*

WOLF *v.* STIX, 96 U. S. 541.

FEDERAL QUESTION.

After a decree in a chancery suit brought to set aside a sale of goods on the ground of fraud against creditors, this court cannot take jurisdiction, notwithstanding a petition was filed in the suit, praying that the decree be set aside and leave granted to introduce evidence of a discharge in bankruptcy.

Motion to dismiss granted.

OPINION.—This was a bill in chancery, filed by Louis Stix & Co. in the Chancery Court of Shelby County, Tennessee, in accordance with the laws and practice of that State, against Marks, Pump & Co. and M. Wolf, to recover a debt due them from Marks, Pump & Co., and to set aside a sale of goods by the latter firm to Wolf, because, as alleged,

it was made to defraud creditors. A writ of attachment was sued out upon this bill, and the goods were attached in the possession of Wolf.

By the Code of Tennessee (§ 3509), the defendants to an attachment suit may replevy the property attached by giving bond, with good security, payable to the plaintiff, in double the amount of the plaintiff's demand, or at the defendant's option, in double the value of the property attached, conditioned to pay the debt, interest, and cost, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit; and in such case (§ 3514) the court may enter judgment or decree upon the bond, in the event of a recovery by the plaintiff, against the defendant and his sureties, for the penalty of the bond, to be satisfied by the delivery of the property or its value, or payment of the recovery.

Wolf replevied the property attached in this case, claiming to be the owner, and gave a replevin bond with Lowenstein and Helman as his sureties, in which the goods were valued at ten thousand dollars. In December, 1872, the Chancery Court decided that there was no fraud in the sale to Wolf; and Marks, Pump & Co. having been discharged in bankruptcy from their debt, the bill was dismissed. From this decree Stix & Co. appealed, March 21st, 1873, to the Supreme Court. March 28th, 1874, Wolf obtained a discharge in bankruptcy from his debts. April 28th, 1877, the Supreme Court reversed the decree of the Chancery Court in the suit of Stix & Co., and entered a decree against Wolf, and Lowenstein and Helman as his sureties in the replevin bond, for sixteen thousand two hundred dollars, the value of the goods and interest, and awarded execution thereon. May 3d, 1877, Wolf and his sureties petitioned the court to set aside this decree, and permit them to come in and plead in that court the discharge of Wolf, or, if that could not be done, to remand the cause, after reversing the

decree below, so that the defense might be made in the Chancery Court; but the Supreme Court being of the opinion that no new defense could be made in that court, and that it was not allowable to set up the defense in bankruptcy by any proceeding there for that purpose, refused the petition, and permitted the decree to stand as already entered.

From this statement of the case it is apparent that no Federal question was actually decided by the court below, and that none was involved in the decision as made. The discharge in bankruptcy was granted more than three years before the action of the Supreme Court which is complained of, and no attempt was made to bring it to the attention of that court until after a decree had been entered in the cause. Upon the face of the record proper, therefore, no Federal question could have been decided, because none was raised.

But upon the case as made by the subsequent petition to set aside the decree the parties occupy no better position, because the court did not decide that the discharge was inoperative as a release of the obligation involved in the suit, but only that the defense of a discharge in bankruptcy after the decree below could not be set up in the Supreme Court, as no new defense could be made there. Such a defense may be made in Tennessee by bill in chancery after the decree in the Supreme Court, but not by the suggestion of the fact in that court. It was so decided in Anderson *v.* Reaves, at the January Term, 1877, of the Supreme Court of that State, as is shown by a copy of the opinion printed with the brief filed on behalf of the defendant in error in support of this motion.

Thus it appears that even upon this motion no Federal question was actually decided, and that, according to the law of Tennessee, none was involved. We see no reason why, according to the practice in that State, the plaintiffs in error are not still at liberty to enforce the discharge in bank-

ruptcy against the decree of the Supreme Court by bill in chancery. *Writ dismissed.*

BOLLING *v.* LERSNER 91 U. S. 594.

FEDERAL QUESTION.

This court cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. It must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

Motion to dismiss granted.

OPINION.—The Circuit Court of Fauquier County, Va., rendered a decree in this cause September 13th, 1867. From this decree Lersner prayed an appeal to the District Court of Appeals, May 17th, 1869. This was allowed by W. Willoughby, judge. Upon this allowance the appeal was docketed in the Appellate Court, and the parties appeared without objection or protest, and were heard. Upon the hearing, the decree of the Circuit Court was reversed, and the cause remanded with instructions to proceed as directed. When the case came to the Circuit Court upon the mandate of the Appellate Court, Bolling appeared, and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the judge who allowed the appeal, had been appointed to his office by the commanding-general exercising military authority in Virginia under the reconstruction acts of Congress, and that those acts were unconstitutional and void. This objection was overruled, and a decree entered according to the mandate. From this decree Bolling took an appeal to the Supreme Court of Appeals, where the action of the Circuit Court was affirmed. To reverse this decree of affirmance the present writ of error has been prosecuted.

We cannot re-examine the judgment or decree of a

State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In this case, Bolling presented to the court for its determination, the question of the constitutionality of the reconstruction acts. This was a Federal question; but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause. While it, perhaps, sufficiently appears that the judge was appointed under the authority of the acts in question, it also appears that he was acting in the discharge of the duties of his office, and that he had the reputation of being the officer he assumed to be. It also appears, that, after the allowance of the appeal, the case was docketed in the Appellate Court; that Bolling appeared there; that he submitted himself to the jurisdiction of that court without objection, and presented his case for adjudication; that the case was heard and decided; and that the objection to the qualification of the judge who allowed the appeal was made for the first time in the Circuit Court, when the case came down with the mandate.

From this it is clear that the case might have been disposed of in the State court without deciding upon the constitutionality of the reconstruction acts. Thus, if it was held that the objection to the authority of the judge came too late, or that the allowance of an appeal by a judge *de facto* was sufficient for all the purposes of jurisdiction in the Appellate Court, it would be quite unnecessary to determine whether the judge held his office by a valid appointment. We might, therefore, dismiss the case, because it does not appear from the record that the Federal question was decided, or that its decision was necessary.

But if we go farther, and look to the opinion of the court, which, in this case, has been certified here as part of the

record, we find that the Federal question was not decided. All the judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office. In this the court but followed its own well-considered holding, by all the judges, in Griffin *v.* Cunningham, 20 Gratt. 31; approved in Quinn *v.* Cunningham, id. 138; and Teel *v.* Young, 23 id. 691; and the repeated decisions of this court. . . . *Writ dismissed for want of jurisdiction.*

WARFIELD *v.* CHAFFE *et al.*, 91 U. S. 690.

FEDERAL QUESTION.

Where the record does not show that a Federal question was raised, though the petition for allowance of the writ of error alleges that such a question was relied upon, this court has no jurisdiction. It must appear in the record.

Motion to dismiss granted.

OPINION.—This action was commenced in the Fourteenth District Court in and for the Parish of Ouachita, Louisiana, to recover the amount due upon a note made by Mrs. Warfield, the plaintiff in error, to W. J. Q. Baker, and by him indorsed to the plaintiffs below—John Chaffe & Brother—and also to enforce a vendor's privilege. Judgment was asked for the amount claimed to be due upon the note, and also for "fifteen dollars costs of stamping." Attached to the petition was a copy of the note, bearing date May 3d, 1867; below which was the following: "Original act duly stamped and canceled by collector of Third District of Louisiana, this third day of September, 1872.—F. A. Hall, Deputy Recorder."

Mrs. Warfield answered the petition; and, among other defenses, she insisted that there were not any revenue stamps

on the note when it went into the hands of the plaintiffs, and that they had no authority to put stamps upon it. She thus, by the pleadings, tendered an issue of fact.

The principal contest between the parties was as to the plaintiff's title to the note; and W. J. Q. Baker was permitted to intervene in his own behalf, and to insist that he was the owner.

At the trial in the District Court, no question as to the stamping of the note appears to have been presented or decided: certainly no testimony was offered on either side in respect to it. All the testimony in the case appears to be incorporated in the record. Judgment having been given against Mrs. Warfield and Baker in the District Court, they each appealed to the Supreme Court, where the judgment was affirmed in July, 1874. In the opinion of the court, which comes here as part of the record, the only reference to the question of stamps which appears is as follows: "The objection that the note was not stamped, not having been made when it was received in evidence, cannot now be considered."

In the petition presented to the chief justice of the Supreme Court of the State for the allowance of this writ, it is stated, for the first time in the case, that the defendant, Mrs. Warfield, claimed the privilege, right, and immunity of being relieved and exempted from all liability on the note or obligation sued on, under the laws of the United States requiring such instruments to be stamped to give them validity at the time the instrument sued upon was executed; and the decision of the Supreme Court of the State denied the claim.

The record sent here from the Supreme Court does not disclose any such claim. The petition for the allowance of the writ in this court is not part of the record of the court below. We act only upon that record; and that does not show that any Federal question was either presented by the

pleadings or upon the trial in the District Court, or decided by the Supreme Court.

Writ of error dismissed for want of jurisdiction.

LONG *et al. v.* CONVERSE *et al.*, 91 U. S. 105.

FEDERAL QUESTION.

To give this court jurisdiction of a decision of a State court, where a title under an act of Congress is in question, the title claimed must be claimed for himself and not for a third party in whose title he has no interest.

Motion to dismiss granted.

OPINION.—Our jurisdiction in this case depends upon the effect to be given to that provision of the Judiciary Act which authorizes this court to re-examine the decisions of the highest court of a State in certain cases, "where any title, right, privilege, or immunity is claimed under" any statute of the United States.

The plaintiffs in error did not claim under the assignees in bankruptcy. They set up the title of the assignees, not to protect their own, but to defeat that of the receivers appointed by the State court. They claimed adversely to both the receivers and assignees. They did not even allege that the assignees had ever attempted to assert title. The contest was one originally for the possession of certain papers. The decree for money was given, because, pending the suit, the papers sought for had been exchanged for money, and the receivers were willing to accept the exchange. In the absence of the assignees from the case, the decree could have no effect upon their title to the coupons or money. If, when the demand was made by the receivers, the plaintiffs in error had surrendered the coupons, that surrender would have been a complete defense to a future action by the assignees, inasmuch as they had not before that time asserted their

claim, either by demand or notice. The title of the assignees to the property would not have been defeated by the transfer. Whatever rights they had against the plaintiffs in error could be enforced by an appropriate proceeding against the receivers. The whole effect of the surrender, so far as the assignees were concerned, was to transfer the custody of the property from the plaintiffs in error to the receivers. In this case the transfer was not voluntary, but in pursuance of a decree rendered by a court of competent jurisdiction, with the assent of the assignees. Under such circumstances it is not easy to see how the assignees can proceed further against the parties, who have only obeyed the commands of the court. Clearly, their remedy, if they have any, is against the property in the hands of the receivers.

The second section of the Act of February 5th, 1867 (14 Stat. 385), which was in force when this writ of error was brought, and which has been substantially re-enacted in the Revised Statutes, § 709, differs only from the twenty-fifth section of the Judiciary Act of 1789, so far as the provision now under consideration is concerned, in the substitution of the word "immunity" for "exemption." In the old act the words were "title, right, privilege, or *exemption*;" in the last, "title, right, privilege, or *immunity*." This does not materially affect the rights of the parties in the present case. The words, when used in this connection and applied to the circumstances of this case, have substantially the same meaning.

The construction of this provision in the Act of 1789 came before this court for consideration as early as 1809, in the case of Owing's Lessee *v.* Norwood, 5 Cranch, 344. That was an action of ejectment in a State court. The defendant, being in possession, set up an outstanding title in a third person under a treaty. The writ of error from this court was dismissed for want of jurisdiction. In the progress of the argument, Chief Justice Marshall used this

language: "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and decisions of the States; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by a treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this case." In Montgomery *v.* Hernandez, 12 Wheat. 129, a suit was brought in a State court by parties beneficially interested in a bond given to the United States by a marshal to secure the faithful performance of his official duties. The suit was in the names of the beneficiaries, and not in that of the United States for their use. It was insisted that there could be no recovery, because the action should have been prosecuted in the name of the United States; and this was assigned for error in this court. But it was said that "the plaintiff in error did not and could not claim any right, title, privilege, or exemption by or under the marshal's bond, or any act of Congress giving authority to sue the obligors for a breach of the condition," and that the court had no jurisdiction of the case on that ground. Again: the same question was presented and elaborately argued in Henderson *v.* Tennessee, 10 How. 311, decided in 1850. That also was an action of ejectment in a State court, in which the defendant set up an outstanding title in a third person, under an Indian treaty; and there, too, the writ was dismissed. In delivering the opinion of the court, Chief Justice Taney said: "It is true, the title set up in this case was claimed under a treaty; but to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. . . . The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to

their assertion of their title in another suit brought by themselves or any person claiming a legal title under them." To the same effect are Hale *v.* Gaines, 22 How. 149, 169, and Verden *v.* Coleman, 1 Black, 472. This must be considered as settling the law in this class of cases; and it seems to be decisive of this case. The plaintiffs in error claim no title, right, privilege, or immunity under the bankrupt law. Their obligation to account for the coupons in their hands is not discharged by the law. The title of the assignees cannot be affected by the decree except through their consent. It follows, therefore, that this case must be

Dismissed for want of jurisdiction.

FASHNACHT *v.* FRANK, 23 Wall. 416.

FEDERAL QUESTION.

Where a petition by a defendant in a State court for removal was overruled for the reason that a final judgment had been rendered, no question is presented which this court can re-examine on an appeal from the final judgment, no exception having been taken to the overruling of the petition.

Motion to dismiss granted.

OPINION.—Previous to the time when a motion for a new trial was made and overruled, no question had been presented in the cause that could under any circumstances give this court jurisdiction upon a writ of error. On the 23d of January a petition was filed by the defendant for the removal of the cause to the Circuit Court of the United States. This petition was at once very properly overruled, for the reason that a final judgment had already been rendered. No exception was taken to this ruling. So far as appears the defendant was satisfied, as he should have been, that he could not have relief in that form against the judgment which had been rendered. On the 31st of January, an

appeal from the judgment was taken to the Supreme Court of the State. This was clearly the appropriate remedy for the correction of the errors of the District Court, if there were any. The action of the District Court in refusing the removal does not appear to have been presented to the Supreme Court upon this appeal. It could not properly have been presented, because the appeal was from the judgment alone, and this action was subsequent to the judgment and independent of it. We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error. *Writ of error dismissed.*

SMITH *v.* ADSIT, 23 Wall. 368.

FEDERAL QUESTION.

This court has no jurisdiction on writ of error to a State court, where the question was, what amounts to a trust, or out of what facts a trust may spring. These are not Federal questions.

Motion to dismiss granted.

OPINION.—We do not perceive that this case differs essentially from what it was in 1872, when it was dismissed for want of jurisdiction in this court to hear it. In the Supreme Court of the State it was an appeal from an inferior court, in which it had been sought to enforce an alleged trust by a bill in equity, and the bill was ordered to be dismissed, because the court was of opinion no trust was proved. The record does not show that the question, whether the sale of the land-warrant was a nullity if made before the warrant issued, was passed upon, much less that it was decided against the complainant. The decree ordering the bill to be dismissed must have been made, if it had been decided that

the sale was void. Even then it would have been necessary to establish the existence of a trust. What amounts to a trust, or out of what facts a trust may spring, are not Federal questions, and on a writ of error to a State court we can review only decisions of Federal questions. The case is covered by Smith *v.* Adsit, in 16 Wallace.

Writ of error dismissed.

GREGORY *v.* MCVEIGH, 23 Wall. 294.

FEDERAL QUESTION.

Where the highest court of a State declines, under its law of procedure, to review the action of an inferior court, a writ of error to the inferior court will lie, if a Federal question be involved.

The validity of a proceeding under the authority of the United States being drawn in question, a Federal question is involved.

Motion to dismiss denied.

OPINION.—The motion to dismiss this cause for want of jurisdiction is denied.

"A final judgment or decree in any suit, in the highest court of a State in which a decision in the suit could be had," may, in a proper case, be re-examined in this court.

The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the State, could decide it.

The Court of Appeals has revisory jurisdiction over the judgments of the Corporation Court of the city of Alexandria, but parties are not permitted, in the class of cases to which this belongs, to take such judgments there for review

as a matter of right. Leave for that purpose must first be obtained. Two modes of obtaining this leave are provided. One by petition to the Court of Appeals itself, and the other by petition to a judge thereof. If the petition is presented to a judge and he denies it generally without more, it may be again presented to the court. But if the judge to whom the application is made, "shall deem the judgment, etc., plainly right," and reject it on that ground, if the order of rejection shall so state, no other petition shall afterward be presented to the same purpose. The parties are left free to present their petitions to the court or to a judge thereof, as they may find it most convenient or desirable.

It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court.

In the present case the Court of Appeals has now no power to review the judgment of the court below. It cannot even entertain a motion for leave to proceed. A judgment has been rendered by the highest court of the State in which a decision can be had. The Court of Appeals has never, in fact, had jurisdiction. A suit cannot be taken there, except upon leave, and that leave has, in the regular order of proceeding, been refused in this case. From this refusal there can be no appeal. Everything has been done that can be to effect the transfer of the cause. The rejection of a petition by one judge does not prevent its presentation to another. Here the petition has been presented to each and every one of the judges, and they have all rejected it because the judgment was "plainly right." Thus the doors of the Court of Appeals have been forever closed against the suit; not through neglect, but in the regular order of proceeding under the law governing the practice.

We think, therefore, that the judgment of the Corporation Court of the city of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may re-examine it upon error.

Without stopping to discuss the other question presented by the motion, it is sufficient to say that we think the case involves the consideration of a Federal question. The proceeding in the District Court was under the authority of the United States, and its validity is drawn in question.

Motion denied.

SMITH *v.* ADSIT, 16 Wall. 185.

FEDERAL QUESTION.

Dismissal of a bill by a State court for want of jurisdiction—the bill seeking to annul a sale because of an alleged violation of an act of Congress—is not a decision of a Federal question.

Questions of jurisdiction of State courts belong exclusively to the State tribunals.

Motion to dismiss granted.

OPINION.—A decree was entered in the State court where the bill was filed against Adsit for six thousand eight hundred and twenty-nine dollars, and the bill dismissed as to the other defendants. He then appealed to the Supreme Court of the State, where the decree against him was reversed, and the bill was dismissed as to him, as the record shows, for want of jurisdiction.

In view of this, we do not perceive that we have any authority to review the judgment of the State court. Plainly, if there be any Federal question in the case, it is because the plaintiff claimed some title, right, privilege, or immunity under the act of Congress to which reference was made in his bill, and because the decision of the court was against the title, right, privilege, or immunity thus set up or claimed. Such a claim and such a decision must appear

in the record. But we think this does not appear. It must be admitted that the question, whether the sale of the land-warrant by Holmes to Adsit, if made before the warrant issued, as charged in the bill, was not a nullity, may have been presented, but it does not appear that such a question was decided, much less that it was decided adversely to the plaintiff in error. Nothing is more certain than that to give this court jurisdiction to review the judgment of a State court, the record must show, either expressly or by necessary intendment, not only that a Federal question was raised, but that it was decided adversely to the party who has caused the case to be removed here.

The doctrine was plainly stated in Crowell *v.* Randell, 10 Pet. 368, and it has been repeated in numerous later decisions. Indeed, it is the express requirement of the twenty-fifth section of the Judiciary Act and of the Act of February 14th, 1867. And the rulings of this court have gone further. In Parmelee *v.* Laurence, 11 Wall. 36, it was said it must appear that the question must have been necessarily involved in the decision, and that the State court could not have given a judgment without deciding it. In Williams *v.* Norris, 12 Wheat. 117, it was held not to be enough that the construction of an act of Congress was drawn in question, and that the decision was against the title of the party, but that it must also appear that the title depended on that act. And in Rector *v.* Ashley, 6 Wall. 142, it was laid down that if the judgment of the State court can be sustained on other grounds than those which are of Federal cognizance, this court will not revise it, though a Federal question may also have been decided therein, and decided erroneously. These decisions go much further than is necessary to sustain our judgment now. As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here. The record does

not inform us what other questions, if any, were decided. It nowhere appears that the sale from Holmes to Adsit was ruled to be valid, notwithstanding the act of Congress which declared that sales of bounty-rights, made or executed prior to the issue of land-warrants therefor, shall be null and void. Nor was it necessary to the decree that was entered that such a decision should have been made. After the land had been sold by Adsit to *bona fide* purchasers without notice, which had been decreed in the court below, from which decree there was no appeal—after it had thus been settled that there was no continuing trust in the land—it may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State court.

We need not pursue the subject further. It is enough that it does not appear the claim of the plaintiff, that the sale of Holmes to Adsit was a nullity because of the act of Congress, was necessarily involved in the decision, or that the sale was decided to be valid, or that the same decree would not have been made if the invalidity of the sale had been acknowledged. *Writ dismissed.*

TARVER *v.* KEACH, 15 Wall. 67.

FEDERAL QUESTION.

A contract being held void by a State court, upon the general principles by which courts determine a transaction to be good or bad on principles of public policy, the decision cannot be reviewed in this court.

Motion to dismiss granted.

OPINION.—In Delmas *v.* The Insurance Company, 14

Wall. 661, decided at last term, we held that when "a decision holding a contract void is made by the highest court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one we are not authorized to review." We are entirely satisfied with that judgment and with the grounds assigned for it, and do not think it necessary to restate them. It follows that the writ of error to the Supreme Court of Texas must be *Dismissed.*

KENNEBECK R. R. *v.* PORTLAND R. R., 14 Wall. 23.

FEDERAL QUESTION.

This court will not take jurisdiction where the judgment of a State court involves a Federal question, if there be distinct and sufficient ground to support the judgment upon non-federal questions.

Motion to dismiss granted.

OPINION.—It has been repeatedly decided by this court that the opinion is no part of the record, and it is only by agreement of counsel and consent of the court that it can be looked into for such purpose. As the record, without the opinion, does not show that such a question was decided, we have examined the opinion with care, and have felt bound to look to the whole of it, as well as that part of it relied on by the plaintiff in error; and though the matter which the plaintiff now alleges was one of the principal questions in the case, to wit, that the law under which the foreclosure was had was passed after the mortgage was executed, and that the method of foreclosure prescribed by that statute impaired the obligation of the contract of mortgage, and was, therefore, void by the Constitution of the United States—does not clearly appear from the pleadings, or the decree, or any other proceedings in the case, yet it does appear that the

question was discussed in the opinion of the court, and that the court was of opinion that the statute did not impair the obligation of the contract.

If this were all of the case we should undoubtedly be bound in this court to inquire whether the Act of 1857 did, as construed by the court, impair the obligation of the contract. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence.

Now, if the State court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that this court cannot inquire whether the Supreme Court of Maine was right in that opinion.

Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the State court could rest, even if it had been in error as to the effect of the Act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court we cannot take jurisdiction, because we could not reverse the case though the Federal question was decided, erroneously in the court below, against the plaintiff in error.

The writ must, therefore, be dismissed for want of jurisdiction.

BANK, ETC., *v.* CITIZENS' BANK, 14 Wall. 9.

FEDERAL QUESTION.

In a suit to recover from a bank money deposited and money collected, the money received by the bank being Confederate notes, the decision of the court below being based upon the jurisprudence of the State, though declared and set forth in the State Constitution, this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—The plaintiff in error brought the suit against the defendant in error in the Fifth District Court of New Orleans, to recover the sum of ninety-three thousand three hundred and eighty dollars for moneys deposited by the plaintiff with the defendant, and moneys collected by the latter for the former. All the so-called moneys received by the defendant were the notes of the rebel government. The District Court on the 27th of March, 1867, gave judgment for the plaintiff. The case was thereupon taken by appeal to the Supreme Court of the State. That court, on the 14th of December, 1869, reversed the judgment of the court below, and dismissed the case. In the opinion delivered, it was said: "Under the Constitution of 1868 the courts of this State cannot entertain an action based upon transactions in Confederate treasury notes. We think the evidence discloses that this case is founded upon dealings in unlawful currency, and the court has often refused to lend its aid to transactions reprobated by law." The Constitution of 1868 was not in existence when the case was decided by the District Court.

The Supreme Court founded its judgment alike upon the constitutional provision and prior adjudications. Those adjudications are numerous and conclusive upon the subject. The Constitution only declared a settled pre-existing rule of jurisprudence in that State. The result in this case would have been necessarily the same if the Constitution had

not contained the provision in question. This brings the case within the authority of Bethel *v.* Demaret, 10 Wall. 537. Upon such a state of facts this court cannot take jurisdiction under the section of the Judiciary Act upon which the writ of error is founded. *Case dismissed.*

PEOPLE *v.* CENTRAL RAILROAD, 12 Wall. 455.

FEDERAL QUESTION.

In a question arising upon an agreement between two States, to which agreement Congress assented, the construction of the act not being drawn in question, and no right or title being set up under it and denied by the State court, the writ of error is dismissed.

Motion to dismiss granted.

OPINION.—We think that the statement of the case shows that the question arose under the agreement and not under any act of Congress. The assent of Congress did not make the act giving it a statute of the United States, in the sense of the twenty-fifth section of the Judiciary Act. The construction of the act was in no way drawn in question, nor has any title or right been set up under it and denied by the State court. It had no effect beyond giving the consent of Congress to the compact between the two States.

The writ of error must, therefore, be *Dismissed.*

NORTHERN RAILROAD *v.* THE PEOPLE, 12 Wall. 384.

FEDERAL QUESTION.

Where the plaintiff in error, in his pleadings and in his argument in this court, assails a State statute as unconstitutional, but the defendant claims nothing under the statute and it is not involved in the judgment, this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—The principles announced in the preceding case of Knox *v.* Exchange Bank govern the present one.

We are unable to see that the judgment of the State court, declaring the dissolution of the Northern Railroad Company, rested in any manner on the act of the New York legislature of March, 1857. It is true that that company, the plaintiff in error in the case, both in the pleading which it filed and in argument here, assails that statute as taking property without due process of law, and impairing the obligation of contracts; but, as the defendant in error claims nothing under that statute, and as the validity or invalidity of that statute is in no way involved in the judgment of dissolution rendered by the State court, there is no question here of which this court has jurisdiction. *Writ dismissed.*

MESSENGER *v.* MASON, 10 Wall. 507.

FEDERAL QUESTION.

The fact that a State court held the statutes of a territory providing for partition of lands among tenants in common valid, will not give this court jurisdiction, under the twenty-fifth section of the Judiciary Act.

Where the organic law of a territory incorporates into its system of laws, indirectly, the ordinances of another body, and provides that they shall be subject to be altered, modified, or repealed by the governor and legislature of the territory, nothing in an act of the territorial legislature conflicting with such law can be set up to draw in question a law of Congress, so incorporated.

Motion to dismiss granted.

OPINION.—It is insisted, on the part of the defendant in error, that an examination of the record will show that there is no Federal question in the case of which this court can take cognizance.

In the case of Maxwell *v.* Newbold *et al.*, 18 How. 511, it was held the objection that "the charge of the court, the verdict of the jury, and the judgment below are each against and in conflict with the Constitution and laws of the United States," was not sufficiently specific to raise a question

within the provisions of this section. The chief justice, in delivering the opinion of the court, observes, that "the clause in the Constitution and the laws of Congress should have been specified by the plaintiffs in error in the State court, in order that this court might see what was the right claimed by them, and whether it was denied by the decision of the State court."

This court had previously held, in Lawler *v.* Walker and Others, 14 How. 149, that the statement in a certificate of the State court that there was drawn in question the validity of statutes of Ohio, without saying what statutes, was too indefinite, and that the statutes complained of in the case should have been specified. These decisions were reaffirmed in Hoyt *v.* Shelden, 1 Black, 518. It is quite clear, upon these authorities, that the constitutional objection taken in the present case is too general to be noticed on a writ of error under this twenty-fifth section.

As to the effect of the certificate from the court below, see Commercial Bank *v.* Buckingham, 5 How. 317; Lawler *v.* Walker, 14 id. 149, and Porter *v.* Foley, 24 id. 413.

One difficulty in bringing the case within this twenty-fifth section is, that it makes no provision for the re-examination of a judgment in a State court, which upholds the validity of a statute of a territory in contravention of the Constitution. It applies only to the case where is drawn in question the validity of a statute of, or authority exercised under, any State. The circumstance, therefore, that the court below held the statute of the territory providing for partition of lands among tenants in common valid is of no importance in the case.

It has been urged on the argument, however, in view of the certificate of the court, that a right set up under the ordinance of 1787, by the defendants at the trial, had been denied them, and that the construction of a law of Congress had thus been drawn in question.

Although the organic law of the territory of Iowa did incorporate into its system of laws, indirectly, many of the provisions of the ordinance of 1787, by extending to its inhabitants the rights and privileges heretofore secured to the territory of Wisconsin by its organic law, among which were those found in the ordinance, yet the same section that conferred these rights and privileges upon the territory of Iowa provided that they should be subject to be altered, modified, or repealed by the governor and legislative assembly of the said territory. If, therefore, anything is found in this act of partition in conflict with these provisions, to that extent they must be regarded as altered or modified, which affords a complete answer to the ground relied upon under the ordinance. *Motion granted.*

CARPENTER *v.* WILLIAMS, 9 Wall. 785.

FEDERAL QUESTION.

A decision of a State court recognizing the title confirmed by an act of Congress and not denying its validity, but determining only the identity of the individual to whom the land was confirmed, rests upon common law rules, and not upon Federal law.

Motion to dismiss granted.

OPINION.—We are of opinion that the record presents no case for the jurisdiction of this court. The case turns solely on the personal identity of the individual to whom the recorder confirmed, or intended to confirm, the lot in question. It involves the construction of no act of Congress. The decision of the court below denies the validity of no act under the authority of the United States. It recognizes to its fullest extent the title confirmed by the act of Congress and the act of confirmation, and only determines to whom that confirmation was made.

It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance.

If this were so, the title to all the vast domain, once vested in the United States, could be brought from the State courts to this tribunal.

In the case before us, the rules which must determine the question at issue are common law rules, and the result cannot be varied by the application of any principle of Federal law or Federal authority. *Writ dismissed.*

The Victory, 6 Wall. 382.

Federal Question.

As the question, whether a case is of admiralty cognizance, and therefore exclusively within the jurisdiction of the courts of the United States, and whether the statutes of a State authorizing the proceeding are void, relied upon in this court, were not raised and decided in the State court, this court has not jurisdiction.

Motion to dismiss granted.

Opinion.—The question which we are asked to decide, viz., whether such a case as this is one of admiralty cognizance, and is therefore exclusively within the jurisdiction of the courts of the United States, and whether the statute of Missouri, which authorized the proceeding, is for that reason void, is an interesting one, and if it had been raised and decided in the court from which the record comes, we would be bound to decide it here. But we do not think it is a fair inference, from that record, that the question was presented to the court or was decided by it.

It has been repeatedly held by this court, that before it can entertain jurisdiction to revise the judgment of a State

court, the point which we are called upon to review must have been raised, and must have been decided adversely to the plaintiff in error. This is so well established that it would be a useless labor to cite authorities to sustain it.

It is true we have said this need not appear by express averment, but if the record shows by necessary intendment that the point was decided, it is sufficient, and the cases of Craig *v.* The State of Missouri, 4 Peters, 410, and The Bridge Proprietors *v.* The Hoboken Company, 1 Wall. 116, are cited to sustain the proposition. It is one which does not need support. It is fully conceded.

But we are of opinion that it must appear that the point mentioned in the Judiciary Act was *actually* decided in the State court; that it received the consideration of the court, and it is not sufficient that now, on fuller examination with the aid of counsel here, we can see that it was a point which ought to have been raised, and which might have been decided. In the case of The Bridge Proprietors *v.* The Hoboken Company, cited by counsel for plaintiff, the court recites with approbation the following language from the previous case of Crowell *v.* Randell, 10 Peters, 368: "It is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown by the record that it did arise, and was applied by the State court to the case."

It is insisted that inasmuch as the authority of the State court rests solely on the State statute, the validity of that statute was necessarily a point in its judgment, but it would contradict the experience of all who are familiar with courts to assume that every time a court acts under a statute, the validity of the statute or the jurisdiction of the court receives its consideration. This is rarely so, unless the question is raised by one of the parties and called to the attention of the court.

The presumption from this record is entirely the other

way. The defendant in his pleading admits impliedly the jurisdiction of the court, the validity of the statute, and the existence of the lien. He only denies that the full amount claimed is due, and no other question is raised or suggested by the bill of exceptions. Nor does it appear that any other question was raised in the Supreme Court of the State than that which was considered by the inferior court. There was, therefore, no occasion for the court to consider the question raised here by counsel.

Writ of error dismissed.

WALKER *v.* VILLAVASO, 6 Wall. 124.

FEDERAL QUESTION.

Where the suit was an ordinary one for seizure and sale under mortgage according to the practice in the courts of Louisiana, and counsel rely upon some infirmity in the jurisdiction of the court below—a question not made or determined in the court below—the writ is dismissed.

Motion to dismiss granted.

OPINION.—The suit in the District Court for the parish of St. Bernard was an ordinary one for seizure and sale under a mortgage according to the practice prevailing in the courts of Louisiana. Indeed, this is hardly denied by the learned counsel for the plaintiff in error, but he relies on some infirmity in the jurisdiction of the court to hear and determine the case; and refers in support of it to certain insurgent proceedings in the State of Louisiana against the then existing government, and to acts of Congress on the subject. But this question as to the competency of the court was not made on the trial, nor did the court below consider or determine any such question.

In order to give this court jurisdiction under the twenty-fifth section, it must appear on the record itself to be one

of the cases enumerated in that section, and nothing out of the record certified to the court can be taken into consideration; and when the proceeding is according to the law of Louisiana, the case within the section must appear by the statement of facts and decision as usually made in such cases by the court. No such case or question appears on the present record. *Writ dismissed.*

RYAN *v.* THOMAS, 4 Wall. 603.

FEDERAL QUESTION.

Where a patent for land is drawn in question in a State court, and the decision is *in favor of its validity*, this court has no revisory power.

Motion to dismiss granted.

OPINION.—We have no jurisdiction of the judgments of State courts except under the twenty-fifth section of the Judiciary Act, and, upon examining the record, we do not find that the case presented is within any clause of it.

The suit in the State court was for the recovery of a tract of land in St. Louis, Missouri. The proofs of the plaintiff consisted of a patent of the United States to one Johnson, dated January 5th, 1843; a certificate of entry by Johnson, issued by the register of the St. Louis Land Office on the 19th of August, 1829; an assignment of the same date by Johnson and the plaintiff indorsed upon the certificate, and a decree, upon default, of the St. Louis Land Court, in a suit by the plaintiff against Johnson, adjudging and decreeing the title to be vested in the possessor.

The defense rested upon the ground that Johnson was a fictitious person, but the court held the patent not void if issued to a real person and transferred by his indorsement to the plaintiff, though such person in making the entry and obtaining the certificate used a fictitious name.

The patent offered by the plaintiff seems to have been the only authority under the United States drawn in question in the State court, and the decision was in favor of its validity. It is only when, in such a case, the decision is against the authority that this court has revisory jurisdiction.

It is suggested, in the brief for the plaintiff in error, that a subsequent patent was relied on by him when defendant in the State court, and that the decision having been against that patent may be reviewed here. But we find no such patent and no such decision in the record.

The writ of error must therefore be *Dismissed.*

SEMPLE *v.* HAGAR, 4 Wall. 431.

FEDERAL QUESTION.

When, on a motion to dismiss for want of jurisdiction, the question relied on is involved with other questions decided in the case, and an examination of a voluminous record is necessary, the court will reserve the question of jurisdiction until final argument on the merits.

Where the contest is for land under patents, and the State court refused to assume jurisdiction, but dismissed the complaint, motion to dismiss is granted.

Motion to dismiss granted.

OPINION.—In all cases of a motion to dismiss the writ of error for want of jurisdiction, the court must necessarily examine the record to find the questions decided by the State court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits.

In the case before us, the want of jurisdiction is patent; it requires no investigation of a long bill of exceptions. It was not decided by the court below on its merits, if it had any. It furnishes no reason for a postponement of our decision of the question.

If, in such cases, the court would postpone the consideration of the question of jurisdiction, we would put it in the power of every litigant in a State court to obtain a stay of execution for three years, or more, by a frivolous pretense that it comes within the provisions of the twenty-fifth section of the Judiciary Act. In many States, all the land titles originated in patents from the United States; and if every question of boundary, of descent, of construction of wills, of contracts, etc., and which may arise in State courts, may be brought here on the mere suggestion that the party, against whom the State court gave their judgment, derived title under a patent from the United States, we should enlarge our jurisdiction to thousands of cases, and increase unnecessarily the burdens of this court, with no corresponding benefit to the litigant. It is plain that, in such cases, there is not "drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States."

We have here a very brief record, and, on the facts of the case, we cannot shut our eyes to the total want of jurisdiction, under the twenty-fifth section, or any other section, of the Judiciary Act.

It is plain, that if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a State court, which did *not* decide that question, and refused

to take jurisdiction of the case. The matter is too plain for argument. *Motion granted.*

RAILROAD COMPANY *v.* ROCK, 4 Wall. 177.

FEDERAL QUESTION.

Relief is claimed in a State court on the grounds that, in submitting to the vote of the people the question of issuing bonds, the local statute was disregarded, and charging the officials who issued the bonds and the parties who received them, with fraud: the local law not being in conflict with the Federal Constitution, the writ of error is dismissed.

Motion to dismiss granted.

OPINION.—After a very careful examination of the record of the case, we are unable to discover that either the validity of the Constitution of the State of Iowa, or the clauses of the Constitution of the United States mentioned in the certificate, are involved in that record, or were decided by the court. It is probable that counsel, in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the chief justice felt bound to certify, when requested, that they were drawn in question. But if the record does not show that they were necessarily drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument.

In Lawler *v.* Walker, 14 How. 149, a case was brought here on a certificate from the State court. It was dismissed for want of jurisdiction. The court said: "The twenty-fifth section of the Judiciary Act requires something more definite than such a certificate to give to this court jurisdiction. The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of

the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given judgment without deciding it." To the same effect is the case of Mills *v.* Brown, 16 Peters, 525.

The bill of complainant claims relief on two grounds:

1st. That the county judge disregarded the requirements of the statute, in the submission to the vote of the people of the question of issuing the bonds.

2d. That the county judge and the railroad company, to whom they were first issued, were guilty of fraud in the issue of the bonds.

The court may have held the bonds void on the latter ground, and may have based its decree on that allegation. If so, there can be no pretense that such a ground involves any question of the Constitution of the United States or of the State of Iowa.

In the argument of counsel before us, no attempt is made to show that any provision of the Constitution of the State of Iowa conflicts in any way with the Constitution of the United States. The whole case, in the language of the brief, is put upon the ground that the "Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts;" and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid. If this were the law, every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort in all cases of contracts where the decisions of State courts were against the validity of the contracts set up in those courts.

This, obviously, was not the purpose of the Judiciary Act.

It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise. No such thing appears in the case before us, which is the case of a citizen of Iowa suing a corporation of Iowa in the Iowa courts, their rights being determined either upon a construction of local law in no way in conflict with the Federal Constitution, or else upon a simple question of fraud.

The writ of error must be *Dismissed.*

Boggs *v.* Mining Company, 3 Wall. 304.

Federal Question.

An allegation of prior possession of land for the purpose of taking out the minerals, without setting up any authority under the United States to take such possession, nor any treaty or statute of the United States, in virtue of which it was taken, will not give this court jurisdiction.

On a plea of a license from a State or the United States, the decision of the State court being not against the validity of such license, but that there was no such license, this court has no jurisdiction.

Motion to dismiss granted.

Opinion.—No question is raised by the pleadings, of which this court has jurisdiction upon writs of error to the Supreme Court of California, unless by the allegation of prior possession of this land for the purpose of taking out the minerals. But this allegation does not set up any authority exercised under the United States in taking such possession, nor any treaty or statute of the United States, in virtue of which it was taken. Nor does it anywhere appear from the record that the decision of the State court was against the validity of any such authority, treaty, or

statute. The case brought before us is, therefore, wanting in the requirement made essential to our jurisdiction by the twenty-fifth section of the Judiciary Act.

If we were at liberty to look into the opinion of the court for the purpose of ascertaining what questions were made on the argument, and decided by the court, we should find that, upon a liberal construction of the stipulations of counsel, the defendants were allowed to insist that they were warranted in their possession of the lands, for the purpose of extracting the minerals, by a license inferred from the general policy of the State or of the United States, in relation to mines of gold and silver and the lands containing them.

We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court.

However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law.

It is the same case, in principle, as would be made by an allegation in defense to an action of ejectment, of a patent from the United States with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it.

The writ of error must, therefore, be *Dismissed.*

LEWIS *v.* CAMPAU, 3 Wall. 106.

FEDERAL QUESTION.

Where the only question passed upon by the State court was one affecting the admissibility of evidence concerning the value of the land in question, this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—Neither the validity of the statute nor its construction was in any way drawn in question. The only question the court had to pass upon, and this only incidentally as affecting the admissibility of evidence, was the value of the land.

This is not a question which can be brought into this court under the twenty-fifth section of the Judiciary Act.

Writ of error dismissed.

ATTORNEY-GENERAL *v.* FEDERAL STREET MEETING-HOUSE, 1 Black, 262.

FEDERAL QUESTION.

A statement in a writ of error to the effect that a Federal question is involved will not give this court jurisdiction, if in fact such question does not appear in the record.

Motion to dismiss granted.

OPINION.—The writ of error in this case suggests, as a foundation for the jurisdiction of this court, "that there was drawn in question the validity of a statute of said commonwealth, to wit, an act of the legislature, passed the 15th day of June, 1805, entitled 'An act declaring and confirming the incorporation of the proprietors of the meeting-house in Federal street,' in the town of Boston, being repugnant to the Constitution of the United States, and the decision of the court was in favor of the validity of said statute."

Is this suggestion of the writ supported by the record, either by direct averment, or by any necessary intendment? We think it is not.

1. The decree of the court is, simply, that the bill be dismissed without any reasons alleged for such dismissal.

2. The bill itself raises no such issue; it refers to the act in question only as conferring the privilege of a corporation on the defendant. It does not aver that the defendants pretend to have title to the property in question by virtue thereof, and challenge its validity.

The answer alleges that respondents were incorporated by the Act of 1805, and that, "under it, they are the true and sole owners of the premises, and that said act was passed on the application and petition of parties who, prior thereto, were owners of pews, or tenants in common of the land and the house thereon." It is not alleged that the act, "*proprio vigore*," divested the plaintiff's title, and vested it in the corporation, but that the title was vested in the corporation at the request of the owners. The only questions, therefore, which could arise on these pleadings were, whether the persons who obtained the act of incorporation were the owners, and whether, after an adverse possession of forty years, a court of equity would interfere to disturb the possession of respondents.

The answer takes issue on the charge of the bill, that Little and his associates had contributed land and money to support a public *charity;* it averred that, on a proper construction of the original deed of the premises, the meeting-house was not dedicated to a charitable use, but was erected for their common use, and held by them in proportion to the sums severally contributed; and, consequently, if the representatives of these tenants in common had their rights transferred to the corporation, it was only a transfer of their rights by their consent, and for their own convenience—an enabling act, with which the complainants had no concern.

The issue then was, not on the validity of the act, but on the construction of the original deed or agreement of the parties who built the meeting house. The validity of the act of assembly of Massachusetts was not, therefore, drawn in question directly by any averment of the pleadings by the decree, or by any necessary intendment from other averments in the pleadings, or evidence on the record. The opinion of the State court, to be found in 3 Gray, 1, confirms this conclusion.

The case is, therefore, dismissed for want of jurisdiction.

PORTER *et al. v.* FOLEY, 24 H. 415.

FEDERAL QUESTION.

The only question decided by the State court, being whether an act of assembly of Kentucky authorizing an executor to sell the real estate of minors, was a valid exercise of power by the legislature, the question being construed under the Constitution of the State, and not of the United States, this court has no jurisdiction.

Motion to dismiss granted.

OPINION:—The record of this case does not show that any question arose or was decided by the State court, which this court has authority to re-examine by virtue of the twenty-fifth section of the Judiciary Act. Without entering into a tedious analysis of the case, it is sufficient to state that the chief or only question in it was, whether an act of assembly of Kentucky authorizing an executor to sell the real estate of minors, was a valid exercise of power by the legislature.

The counsel for plaintiff objected to the admission of the deed made in pursuance of such authority, "because said act and supplement were unconstitutional and void."

This objection was very properly construed by the court as having reference to the validity of the act of the legislature of

Kentucky, not as contrary to any provision of the Constitution of the United States, but as raising the question whether the legislature had a power under the Constitution of that State, by general or special enactment, to authorize the sale of real estate of infants. The court decided that it had such power; and if it had, it is abundantly evident that there is no article nor clause in the Constitution of the United States which could interfere with it. Let the writ of error be dismissed.

ROBERTSON, TRUSTEE, ETC., *v.* COULTER *et al.*, EXRS., ETC., 16 H. 106.

FEDERAL QUESTION.

A question presented to a State court, being merely as to the powers of a trustee, appointed under a State statute—his powers depending upon a construction of the statute—this court has no right to inquire whether the State court expounded it correctly or not.

Motion to dismiss granted.

OPINION.—This case is brought here by writ of error directed to the High Court of Errors and Appeals of the State of Mississippi, under the twenty-fifth section of the Act of 1789, upon the ground that the law of that State, under which this decision was made, impairs the obligation of contracts. It is an action of *assumpsit*. The plaintiff declares on a promissory note made by Collins, in his lifetime, to the Commercial Bank of Natchez.

The declaration avers that, after the execution of the note, and before the commencement of this suit, a judgment of forfeiture was rendered against the bank on the 12th of December, 1845, according to a statute of the State in such case made and provided; and that the plaintiff was appointed by the court trustee, and as such took possession of this note; and that by means thereof, and by force of the statute of the State, Collins became liable to pay him the money. The de-

fendants pleaded, that the plaintiff, as trustee, had collected and received of the debts, effects, and property of the bank, an amount of money sufficient to pay the debts of the bank, and all costs, charges, and expenses incident to the performance of the trust. To this plea, the plaintiff demurred. The Court of Appeals overruled the demurrer, and gave judgment for the defendant, upon the ground that the plea was a full and complete bar to the enforcement of the right set out in the declaration. And this judgment is now brought here for revision by writ of error. A motion has been made to dismiss the writ for want of jurisdiction. And in the argument of this motion, a question has been raised, whether, by the common law, the debts due to a bank, at the time of the forfeiture of its charter, would not be extinguished upon the dissolution of the corporation, and the creditors without remedy. And cases have been referred to in the Mississippi Reports, in which it has been decided that, by the common law, previous to any State legislation on the subject, upon the dissolution of a banking corporation, its real estate reverted to the grantor, and its personal property belonged to the State; that the debts due to it were extinguished, and the creditors without remedy against the assets or any of them which belonged to the bank at the time of the forfeiture. But this question is not before us on this writ of error, and we express no opinion upon it. The suit is not brought by a creditor of the bank, seeking to recover a debt due to him by the corporation at the time of its dissolution. But it is brought by a trustee appointed by a court of the State, under the authority of a statute of the State; and the question before the State court, which the pleadings presented, was whether the trustee was authorized, by the law under which he was appointed, to collect more money from the debtors of the corporation than was necessary to pay its debts and the expenses of the trust.

Now, in authorizing the appointment of a trustee, where a

banking corporation was dissolved, the State had undoubtedly a right to restrict his power within such limits as it thought proper. And the trustee could exercise no power over the assets or credits of the bank beyond that which the law authorized. The Court of Appeals, it appears, decided that the statute did not authorize him to collect more than was sufficient to pay the debts of the corporation and the costs and charges of the trust. And as the demurrer to the plea admitted that he had collected enough for that purpose, the court held that he could not maintain a suit against the defendants to recover more.

The question, therefore, presented to the State court was merely as to the powers of a trustee, appointed by virtue of a statute of Mississippi. His powers depended upon the construction of the statute. And we have no right to inquire whether the State court expounded it correctly or not. We are bound to receive their construction as the true one. And this statute, as expounded by the court, does not affect the rights of the creditors of the bank or the stockholders. The plaintiff does not claim a right to the money under a contract made by him, but under the powers and rights vested in him by the statute. And if the statute clothes him with the power to collect the debts and deal with the assets of the bank to a certain amount only, and for certain purposes, we do not see how such a limitation of his authority interferes in any degree with the obligation of contracts.

The writ of error to this court must consequently be dismissed for want of jurisdiction.

UDELL *et al. v.* DAVIDSON, 7 H. 769.

FEDERAL QUESTION.

A decision of a State court that land acquired under a Federal statute is chargeable with a trust, cannot be reviewed in this court, the trust being placed upon the ground of contract, and no impeachment of the grant being involved.

Motion to dismiss granted.

OPINION.—A motion has been made to dismiss this case for want of jurisdiction. It appears that a man by the name of Gregory had obtained, by residence on the land mentioned in the proceedings, a right of pre-emption, under the act of Congress of 1838. But, before he paid the price fixed by the government in such cases, or made the entry, he sold his right to Miller, one of the plaintiffs in error. Miller afterward conveyed to a man by the name of Joslyn, in secret trust for himself and subject to his control. Subsequently to this conveyance, Joslyn, by direction of Miller, conveyed to Udell, the other plaintiff in error, in trust to sell to the highest bidder, and apply the proceeds to the payment of the creditors of Miller, *pro rata*, if they were not sufficient to pay all demands.

Udell accepted the trust, and after having done so, made an agreement with Gregory, by which Gregory was to enter the land at the proper office, at the pre-emption price, and then convey to Udell in trust for the benefit of Miller's creditors, reserving a small portion of the land to Gregory himself. Udell was to furnish the money to enable Gregory to make the entry.

Under this agreement, Udell executed a release to Gregory of all his right to the land, in order to enable him to make the entry as pre-emptioner, and at the same time took from him a note for one thousand dollars, which was to be given up if Gregory made the conveyance according to his agree-

ment. The land was worth a thousand dollars. The government price to the pre-emptioner was only two hundred dollars, which sum was advanced by Udell to Gregory. One hundred and fifty dollars of this money belonged to the creditors of Miller, and was so applied at his request, and upon his statement that his application would be for the interest of his creditors. The remaining fifty was advanced by Udell to be repaid out of the proceeds of the land when sold. But it does not appear that the defendant in error, or indeed any of Miller's creditors, sanctioned this transaction at the time, or had knowledge of this application of the trust funds.

With the money thus obtained, Gregory made the entry, and then executed a deed to Udell. This deed, upon the face of it, is absolute, and contains no trust for the creditors.

After having thus obtained a conveyance, Udell refused to execute the trust, and therefore the defendant in error, as one of the creditors of Miller, in behalf of himself and the other creditors, filed a bill in chancery, setting out more at large the facts above stated, and praying that the land might be sold for their benefit, in pursuance of the trust.

The plaintiffs in error demurred to the bill, assigning various causes of demurrer, and, among others, that the transaction with Gregory, by which Udell obtained a conveyance, was in violation of the Act of 1838.

The Chancery Court, upon the hearing, decided that the land in the hands of Udell was chargeable with the trust, and directed it to be sold, and the proceeds to be applied accordingly. This decree was affirmed in the Supreme Court of the State, and the present writ of error has been presented upon that judgment.

It is unnecessary to notice any of the various causes of demurrer assigned by the plaintiffs in error, except that which relies on the provisions of the Act of 1838. For this being a writ of error to a State court, we have no right

to revise its decision upon any of the other causes assigned, and the only question before this court is whether any title, right, privilege, or exemption claimed by the plaintiffs in error in the State court under this act of Congress was drawn in question and decided against them.

They do not claim that Udell obtained a valid title by the entry made by Gregory, and his subsequent conveyance to Udell. And if their defense had been placed on that ground, it would not have given jurisdiction to this court, because the proceeding to charge it with a trust created by contract would have been no impeachment of the grant made by the United States.

They defend themselves upon the ground that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the Act of 1838. This is undoubtedly true; for the act requires the party who claims the right of pre-emption by residence to make oath that he has not contracted to sell or transfer the land to any other person. And he is not permitted to purchase at the low price at which the person entitled to pre-emption is allowed to buy, until this oath is taken and filed with the Register of the Land Office. And if he swears falsely, he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a *bona fide* purchaser without notice. The plaintiffs in error admit that they participated in the fraud, and consequently Udell, upon their own showing, has acquired no right to the land under the act of Congress on which he relies. They do not claim that he obtained a valid title under the law, but insist that the transaction was against its policy, and in violation of its principles. What right or privilege does he then claim under this act of Congress? It is this: He not only admits, but insists, that, by a fraud upon the government, he has obtained a deed to himself for this land, and that he, being trustee for the creditors of Miller, used

the money which belonged to his *cestui que trusts* to accomplish his purposes; and now contends that, by means of this fraud upon the government, he has acquired, under this act of Congress a right to perpetrate a fraud upon his *cestui que trusts*. This, in plain words, is the amount of his defense; and this is the right or privilege which he claims under the provisions of the Act of 1838, and calls upon this court to recognize and maintain. We shall not comment on such a claim. The writ of error must be dismissed for want of jurisdiction.

McBRIDE *v.* THE LESSEE OF HOEY, 11 Pet. 167.

FEDERAL QUESTION.

A case involving questions of sale and conveyance under a Federal statute, as well as questions concerning redemption of the land from tax sale under State laws—the latter being the only questions raised and decided below—this court is without jurisdiction.

Motion to dismiss granted.

OPINION.—This case comes before the court on a writ of error, directed to the judges of the Supreme Court of Pennsylvania for the Western District.

The material facts in the case may be stated in a few words. William Hoey, the defendant in error, brought an action of ejectment in the Court of Common Pleas of Mercer County, for the land in question, claiming under a deed from Aaron Hakney, treasurer of the county, upon a sale made for taxes due on the said land to the State of Pennsylvania. This deed is dated October 14th, 1782. The defendant offered in evidence a deed to him from Theophilus T. Ware, collector of the United States direct taxes for the tenth collection district of the State of Pennsylvania, dated July 3d, 1821; and also offered evidence that on the 10th of June, 1824, he had paid to the treasurer of the county the taxes due on the land to the State, and for which it had been sold, as above stated, in order to redeem it.

It appears from the exception, that the defendant admitted that the sale made by the United States collector was not warranted by the act of Congress, and that the deed was invalid. But although the deed was inoperative, and did not convey the title to him, yet as he was in possession under this deed, claiming title, and the deed upon the face of it purported to convey the land to him, he insisted that the deed, coupled with the possession under it, was sufficient evidence of title to authorize him to redeem the land within the time limited for redemption by the laws of Pennsylvania, after a sale for State taxes; and that having paid the taxes within that time, the title of the lessor under this deed was defeated. The Court of Common Pleas gave judgment in favor of the plaintiff, and the case being removed by writ of error to the Supreme Court of Pennsylvania for the Western District, the judgment of the Court of Common Pleas was there affirmed.

The statement of the case shows that the question upon which the case turned, and which was decided by the Supreme Court, depended entirely upon the laws of Pennsylvania, and not upon the act of Congress. The question brought before the State court, and there decided against the plaintiff in error, was this: Is a person in possession of land in Pennsylvania, claiming title to it under a deed which, upon the face of it, appears to be a good one, but which is inoperative and invalid, entitled to redeem the land, after it has been sold for taxes due to the State, so as to defeat the title of the purchaser under the State law? It is evident that such a question must depend altogether upon the laws of the State, and not upon any law of the United States. The exception states that the plaintiff in error admitted that the sale and conveyance made by the United States collector was not warranted by the act of Congress, and that his deed was invalid. No question was made or decided by the court upon the validity or construction of the act of Congress, nor upon the

authority exercised under it. The only question raised or decided in the State court was the one above stated; and upon such question, depending altogether upon the State laws, this court have no power to revise the decision of the State court in this form of proceeding.

The writ of error must therefore be dismissed.

THE MAYOR *et al.* *v.* DE ARMAS, 9 Pet. 223.

FEDERAL QUESTION.

In a claim in a State court, against the city of New Orleans for land by virtue of a United States patent, confirming pre-existing rights, the adverse claim of the city resting upon a question of *dedication*, and not upon any treaty or act of Congress, this court is without jurisdiction.

Motion to dismiss granted.

OPINION.—The appellees claim title to a lot of ground in the city of New Orleans, as purchasers from the heirs of Catharine Gonzales, the widow of Thomas Beltran, *alias* Bertrand, who had been in possession of the lot for several years by permission of the Spanish government. This incomplete title was regularly confirmed under the laws of the United States, and a patent was issued for the premises to Catharine Gonzales on the 17th of February, 1821.

The city of New Orleans, claiming this lot as being part of a quay, dedicated to the use of the city in the original plan of the town, and therefore not grantable by the king, has enlarged the levee so as to embrace it. The appellees brought their petitory action in the District Court of the State of Louisiana, praying to be confirmed in their rights to the said lot of ground, and that the corporation might be enjoined from disturbing them in the exercise thereof.

The District Court pronounced its judgment in favor of the petitioners, which, on appeal, was affirmed by the Supreme

Court of the State. This judgment of affirmance has been removed into this court, under the twenty-fifth section of the Judicial Act.

The merits of the controversy cannot be revised in this tribunal. We can inquire only whether the record shows that the Constitution, or a treaty, or a law of the United States, has been violated by the decision of the State court. The appellees move to dismiss the writ of error, because no such violation appears.

In support of his motion, the counsel has, we think, in his argument, prescribed too narrow a principle for the action of this court. He says, very truly, that the twenty-fifth section of the Judicial Act is limited by the Constitution, and must be construed so as to be confined within those limits; but he adds, that a case can arise under the Constitution or treaty only when the right is created by the Constitution or by a treaty. We think differently. This construction would defeat the obvious purpose of the Constitution as well as of the act of Congress. The language of both instruments extends the jurisdiction of this court to rights protected by the Constitution, treaties, or laws of the United States, from whatever source those rights may spring.

To sustain the jurisdiction of the court in the case now under consideration, it must be shown that the title set up by the city of New Orleans is protected by the treaty ceding Louisiana to the United States (8 Stats. at Large, 200), or by some act of Congress applicable to that title. The counsel in support of the motion contends, and we think correctly, that the treaty does not embrace the case.

The first article makes the cession, and the second describes its extent, as comprehending every right vested in France. The third is expressed in these words: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment

of all the rights, advantages, and immunities of citizens of the United States; and, in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." No other article of the treaty is supposed to contain any stipulation for the rights of individuals. This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible upon an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any one of these rights been violated while this stipulation continued in force, the individual supposing himself to be injured might have brought his case into this court under the twenty-fifth section of the Judicial Act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." The right to bring questions of title decided in a State court before this tribunal is not classed among these immunities. The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister States, when their titles are decided by the tribunals of the State.

The counsel for the appellant scarcely hopes to maintain the jurisdiction of the court under the treaty, but seems to rely on the act of Congress for admitting the State of Louisiana into the Union (2 Stats. at Large, 701). The section of that act which is supposed to apply is in these words: "Be it enacted, etc., that the said State shall become, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever, by the name and title of the State of Louisiana."

This simply carries into execution the third article of the

treaty of cession; and cannot, as has already been observed, be construed to give appellate jurisdiction to this court over all questions of title between the citizens of Louisiana. If, in any case, such jurisdiction could be supposed to be given, it might be where an act of Congress attempted to divest a title which was vested under the pre-existing government. Therefore, the counsel opposing the motion contends that the jurisdiction of the court is involved in the merits of the controversy, and cannot be separated from them. We do not think so. The controversy in the State court was between two titles; the one originating under the French, the other under the Spanish government. It is true the successful party had obtained a patent from the United States, acknowledging the validity of his previous incomplete title under the King of Spain. But this patent did not profess to destroy any previous existing title, nor could it so operate, nor was it understood so to operate by the State court. It appears, from the petition filed in the District Court, that the patent was issued in pursuance of the Act of the 11th of May, 1820 (3 Stats. at Large, 573), entitled, "An act supplementary to the several acts for the adjustment of land-claims in the State of Louisiana." That act confirms the titles to which it applies, "against any claim on the part of the United States." The title of the city of New Orleans would not be affected by this confirmation. But, independent of this act, it is a principle applicable to every grant, that it cannot affect pre-existing titles. The United States *v.* Arredondo, 6 Pet. 738.

The judgment of the State court appears on the record to have depended on, and certainly ought to have depended on, the opinion entertained by that court of the legal rights of the parties under the crowns of France and Spain. The case involves no principle on which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana

to the United States. It would also comprehend all controversies concerning titles in any of the new States, since they are admitted into the Union by laws expressed in similar language.

The writ of error is dismissed, this court having no jurisdiction in the cause.

MILLER, USE U. S., *v.* NICHOLLS, 4 Wheat. 311.

FEDERAL QUESTION.

Where the question in a State court, as to the lien of a judgment against a State accounting officer, upon his real estate, in conflict with claims of the United States growing out of said real estate, depended upon the State law, the constitutionality of which was not questioned this court can take no jurisdiction.

Motion to dismiss granted.

OPINION.—The question decided in the Supreme Court of the State of Pennsylvania respected only the construction of a law of that State. It does not appear, from the record, that either the constitutionality of the law of Pennsylvania or any act of Congress was drawn into question. It would not be required that the record should, in terms, state a misconstruction of an act of Congress, or that an act of Congress was drawn into question. It would have been sufficient to give this court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case. That is not shown by this record. The act of Congress which is supposed to have been disregarded, and which, probably, was disregarded by the State court, is that which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the Supreme Court of Pennsylvania. But that fact does not appear. No other question is presented

than the correctness of the decision of the State court, according to the laws of Pennsylvania, and that is a question over which this court can take no jurisdiction:

The writ of error must be dismissed.

MOWER *v.* FLETCHER; SAME *v.* SAME AND ANOTHER, 114 U. S. 127.

FINAL JUDGMENT.

A judgment of the highest court of a State, that the judgment of a lower court "be and the same is hereby reversed with costs, with directions . . . to enter judgment on the findings for the plaintiff as prayed for in his complaint," is final, for the purposes of a writ of error.

Motions to dismiss overruled.

OPINION.—These motions are made on the ground that the judgments for the review of which the writs of error were sued out are not final judgments. The judgment in each case is that the judgment of the State District Court "be and the same is hereby reversed with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. Bostweck *v.* Brinkerhoff, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the

judgment of the Supreme Court, which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation.

The motion in each of the cases is overruled.

DAVIES *v.* CORBIN, 112 U. S. 36.

FINAL JUDGMENT—AMOUNT—MANDAMUS.

The tax, as a whole, is the amount which determines the jurisdiction of this court, in a proceeding by mandamus to compel a tax collector to collect a single tax levied for the joint benefit of all the relators; and an order awarding such writ is a final judgment within the meaning of the statutes regulating writs of error to this court.

Motion to dismiss, overruled.

OPINION.—The relators moved to dismiss the writ, because (1) an order awarding a peremptory writ of mandamus is not a "final judgment;" and (2) the value of the matter in dispute does not exceed five thousand dollars, inasmuch as no one of the relators will be "entitled to receive of the tax collected so much as five thousand dollars, and no single taxpayer will be required to pay that amount of tax."

A motion to affirm, as allowed by Rule 6, § 5, has not been united, as it very properly might have been, with this motion to dismiss. As to the first objection, it is sufficient to say that the practice of the court has always been the other way. Our reports are full of cases in which jurisdiction of this kind has been entertained, and from 1867, when Riggs *v.* Johnson County, 6 Wall. 166, was decided, until now, our power to review such orders as final judgments has passed substantially unchallenged. While the writ of

mandamus, in cases like this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the writ; and, second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defense, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce a judgment. The proceeding may be likened to a creditor's bill in equity which is resorted to in aid of execution. The writ which is wanted cannot be had on application to a ministerial officer. It can only issue after a judgment of the court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court.

The second objection is, to our minds, equally untenable. The writ which has been ordered in this case is not like that in Hawley *v.* Fairbanks, 108 U. S. 543, to compel the levy of taxes to pay separate and distinct judgments in favor of several relators, who, for convenience and to save expense, united in one suit to enforce their respective rights, but to compel a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest. As in the cases of Shields *v.* Thomas, 17 How. 3, 5, and The Connemara, 103 U. S. 754, all the relators claim under one and the same title, to wit, the levy of a tax which has been made for their benefit. They have a common interest in the tax, and it is perfectly immaterial to the tax collector

how it is divided among them. He has no controversy with them on that point; and if there is any difficulty as to the proportions in which they are to share the proceeds of his collections, the dispute will be among themselves and not with him. He cannot act upon separate instructions from the several creditors. His duty is to collect the tax for the benefit of all alike. A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax of ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purposes of distribution among all the creditors. It is apparent, therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them, after the collection is made, according to their several shares. The value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected. It is conceded that the amount of the tax is more than five thousand dollars. *The motion to dismiss is overruled.*

HARRINGTON *v.* HOLLER, 111 U. S. 796.

FINAL JUDGMENT—PRACTICE.

An order of dismissal for failure to file the transcript and docket the cause within the time required by law is not a final judgment.

Motion to dismiss granted.

OPINION.—This motion is granted on the authority of Insurance Company *v.* Comstock, 16 Wall. 258, and Railroad Company *v.* Wiswall, 23 Wall. 507. An order of the Supreme Court of Washington Territory, dismissing a writ

of error to a district court, because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law, is not a final judgment or a final decision within the meaning of those terms as used in §§ 702 and 1911 of the Revised Statutes regulating writs of error and appeals to this court from the Supreme Court of the territory. Section 702 provides for the review of final judgments and decrees by writ of error or appeal, and § 1911 regulates the mode and manner of taking the writ or procuring the allowance of the appeal. The use of the term "final decisions" in § 1911 does not enlarge the scope of the jurisdiction of this court. It is only a substitute for the words "final judgments and decrees" in § 702, and means the same thing.

The dismissal of the writ was a refusal to hear and decide the cause. The remedy in such a case, if any, is by mandamus to compel the court to entertain the case and proceed to its determination, not by writ of error to review what has been done. *Dismissed.*

BOSTWICK *v.* BRINKERHOFF, 106 U. S. 3.

FINAL JUDGMENT.

On appeal, a judgment for plaintiff on demurrer, with leave to defendants to withdraw the demurrer and answer, is not a final judgment.

Motion to dismiss granted.

OPINION.—This was a suit begun in the Supreme Court of the State of New York by a stockholder in a national bank against the directers, to recover damages for their negligence in the performance of their official duties. A demurrer was filed to the complaint, which raised, among others, the question whether such an action could be brought in a State court. The Supreme Court at special term sus-

tained the demurrer and dismissed the complaint. This judgment was affirmed at general term. An appeal was then taken to the Court of Appeals, where it was ordered and adjudged "that the judgment of the general term . . . be . . . reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs . . . and to answer the complaint." It was also further ordered that the record and the proceedings in the Court of Appeals be remitted to the Supreme Court, "there to be proceeded upon according to law." From this judgment of the Court of Appeals a writ of error was taken to this court, which the defendant in error now moves to dismiss because the judgment to be reviewed is not a final judgment.

The rule is well settled and of long standing that a judgment or decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. . . . It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error. . . . This clearly is a judgment of that kind. The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent the litigation between the parties has been terminated, so far as the State courts are concerned; but it still remains to decide whether the directors have in

fact been guilty of the negligence complained of, and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit. *Writ dismissed.*

GRANT *v.* PHŒNIX INSURANCE COMPANY, 106 U. S. 429.

FINAL DECREE.

To be final, for purposes of jurisdiction in this court, the decree must terminate the litigation on the merits of the case. A decree which declares that the plaintiff is the owner of the debt secured by the deed of trust in question, and refers the case to the auditor to ascertain the amount due, but makes no order of sale, is not a final decree.

Motion to dismiss granted.

OPINION.—The rule is well settled that a decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered. This subject was considered at the present term in Bostwick *v.* Brinkerhoff, *ante*, p. 3, where a large number of cases are cited. It has also been many times decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal. . . . But in Railroad Company *v.* Swasey, 23 Wall. 405, it was held that to "justify such a sale, without consent, the amount due upon the debt must be determined. . . . Until this is done the rights

of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged." In this the court but followed the principle acted on in Barnard *v.* Gibson, 7 How. 650; Crawford *v.* Points, 13 id. 11; Humiston *v.* Stainthorp, 2 Wall. 106; and many other cases.

The present decree is not final according to this rule. It does not order a sale of the property. It overrules the defense of the appellant as set forth in his cross-bill, and declares that the appellee is the holder and owner of the debt secured by the deeds of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens, and the claim for taxes. It is true that the court finds the amount due the appellee largely exceeds the value of the property, but this is only as a foundation for the order appointing the receiver. If in point of fact it is not true, the finding will not conclude the parties in the final closing up of the suit. The order for the delivery of the property is only in aid of the foreclosure proceedings, and to subject the income, pending the suit, to the payment of any sum that may in the end be found to be due. If anything remains, either of the income or of the proceeds of the sale after the mortgage or trust debts are satisfied, it will go to the appellant, notwithstanding what has been decreed. There is no order, as in Forgay *v.* Conrad, 6 How. 201, Thomson *v.* Dean, 7 Wall. 342, and other cases of a like character, adjudging the property to belong absolutely to the appellee, and ordering immediate delivery of possession. In Forgay *v.* Conrad, *supra*, which is a leading case on this question, it was expressly said by Mr. Chief Justice Taney (p. 204) that the rule did not extend to cases where property was directed to be delivered to a receiver. The reason is that the possession of the receiver is that of the court, and

he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it. *Appeal dismissed.*

Mr. Justice Miller *dissented.*

GREEN *v.* FISK, 103 U. S. 518.

FINAL DECREE.

A decree, in partition proceedings, ascertaining the extent of the petitioner's interest, and referring the case to a master "to proceed to partition according to law under the direction of the court," is not a final decree.

Motion to dismiss granted.

OPINION.—This was a suit begun by Mrs. Fisk, the appellee, in a State court of Louisiana, to obtain a partition of real property. She alleged that she was the owner of one-half the property; that she was not willing to continue her joint ownership, and that a partition by sale was necessary, as a division could not be made in kind. The prayer of her petition was in accordance with these allegations.

Green, the defendant below, being a citizen of California, removed the case to the Circuit Court of the United States for the District of Louisiana. In that court, on the 31st of March, 1879, Mrs. Fisk was decreed to be the owner of one-half the property, and the case was referred to "J. W. Gurley, Esq., master, to proceed to a partition according to law, under the direction of the court." From that decree an appeal was taken by the defendant, which Mrs. Fisk now moves to dismiss, because the decree appealed from is not the final decree in the cause.

We think the motion must be granted. In the Circuit

Court the suit was one in equity for partition. Although no formal order was entered assigning it to the equity side of the court, that was clearly its proper place, and it was so treated by the parties and the court.

In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made, and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. . . .

A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought, that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries, and report a partition. Upon the coming in of the report the court acts again. If the commissioners make a division the court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommend a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended.

In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The master was in everything to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the partition

which was asked. There are still questions, in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for.

In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the court, and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial, but judicial. The law has prescribed no fixed rules by which the officers of the court are to be governed in the performance of the duty assigned to them. The court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds. *Appeal dismissed.*

ZELLER *et al. v.* SWITZER, 91 U. S. 487.

FINAL JUDGMENT.

A decision of a State court that the defense set forth in peremptory exceptions was not good, and remanding the cause to be proceeded with according to law, is not final.

Motion to dismiss granted.

OPINION.—We think this motion must be granted. The judgment is one of reversal only, and the case is remanded to be proceeded with according to law. The Supreme Court decided that the defense set forth in the peremptory excep-

tion was not good; and that is all that court decided. The case was, therefore, sent back for trial upon the defenses set up in the answer, or any other that might be properly presented. If the decision below upon the exception had been correct, such a trial would have been unnecessary. The Supreme Court having decided that it was not correct, the inferior court must now proceed further. This brings the case within our ruling at the present term in *Ex parte* French, *supra*, p. 423. *The writ is dismissed.*

BUTTERFIELD *v.* USHER, 91 U. S. 246.

FINAL DECREE.

A decree setting aside one sale and ordering another is not final.

Motion to dismiss granted.

OPINION.—The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has been often held, is not final. Where the practice allows appeals from interlocutory decrees, an appeal might lie from such a decree as this. Such was the practice in New York. . . . Consequently it was said in Delaplaine *v.* Lawrence, 10 Paige, 604: "In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher

tribunal." But our jurisdiction upon appeal is statutory only. If some act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction.

We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at a proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

In Blossom *v.* R. R. Co., 1 Wall. 655, and 3 id. 196, we entertained such an appeal; but the decree there appealed from was final. There was no order to resell, for the reason that, between the time of Blossom's bid and the time of the order of the court appealed from, the decree for the satisfaction of which the sale had been ordered was paid. The decree against Blossom, therefore, was the last which the court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the court for any purpose connected with that action.

This appeal is, therefore, dismissed for want of jurisdiction.

McComb, Executor, *v.* Commissioners of Knox County, Ohio, 91 U. S. 1.

Final Judgment—Highest Court of a State.

A final judgment of a Court of Common Pleas rendered upon a mandate of the Supreme Court of the State to proceed according to law, cannot be re-examined here. The judgment of the Supreme Court was not final; and that of the Common Pleas was not the judgment of the highest court of the State, etc.

The writ of error was to the Court of Common Pleas.

Motion to dismiss granted.

OPINION.—The Commissioners of Knox County having sued McComb in the Court of Common Pleas of Richland County, he filed an answer to their petition, to which they demurred, alleging for cause that it did not contain facts sufficient to bar the action. This demurrer was overruled, and replies were thereupon filed. McComb then demurred to the replies, because the facts stated did not constitute a defense to the matter set up in the answer. This demurrer was sustained, and judgment given in favor of McComb.

The case was then taken by writ of error to the Supreme Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining the demurrer to the replies, and overruling that to the answer; but, upon suggestion by McComb that he might ask leave to amend his answer, the cause was remanded "for further proceedings according to law." Upon the filing of the mandate in the Common Pleas, that court, in accordance with the decision of the Supreme Court, overruled the demurrer to the replies, and sustained that to the answer. McComb did not ask leave to amend his answer, but elected to rely upon his defense, as already stated. Thereupon the court gave judgment against him upon the case made by the petition. This writ of error is prosecuted to reverse that judgment.

The Court of Common Pleas is not the highest court of the State; but the judgment we are called upon to re-examine is the judgment of that court alone. The judgment of the Supreme Court is one of reversal only. As such, it was not a final judgment. . . . The Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law

of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment. In fact, the cause was sent back for further proceedings, because of the suggestion by McComb that he might want to present a new defense by amending his answer.

The final judgment is, therefore, the judgment of the Court of Common Pleas, and not of the Supreme Court. It may have been the necessary result of the decision by the Supreme Court of the questions presented for its determination; but it is none the less, on that account, the act of the Common Pleas. As such, it was, when rendered, open to review by the Supreme Court, and for that reason is not the final judgment "of the highest court in the State in which a decision in the suit could be had." Revised Statutes, § 709.

The writ is dismissed.

RAILROAD COMPANY *v.* WISWALL, 23 Wall. 507.

FINAL JUDGMENT—REMOVAL CAUSES.

An order remanding from a circuit to a State court, and refusing to hear and decide a cause, is not a final judgment.

Motion to dismiss granted.

OPINION.—The writ of error is dismissed upon the authority of Insurance Company *v.* Comstock, 16 Wall. 258. The order of the Circuit Court remanding the cause to the State court is not a "final judgment" in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done.

THOMAS & CO. *v.* WOOLDRIDGE, 23 Wall. 283.

FINAL DECREE—MOTION IN ADVANCE OF THE TERM APPEALED TO—WAIVER OF NOTICE OF MOTION.

A motion by the appellees to dismiss, signed by the attorney of the only defendant who had any real interest, is sufficient.

Appeal will not lie from a decree dissolving an injunction, without dismissing the bill.

Motion to dismiss granted.

OPINION.—It is first objected that this motion cannot be entertained now, because the appellants had until the next term to file the record. In *Ex parte* Russell, we decided that "unless some unforeseen inconvenience should arise from the practice, we would not refuse to hear a motion to dismiss before the term in which, in regular order, the record ought to be returned," if the record was actually brought here and printed. We think now, as we did then, that such a practice will "be likely to prevent great delays and expense and further the ends of justice." 13 Wall 671

It is next objected that the notice of the motion is insufficient, because it was not accompanied by a copy of the brief or argument to be used in its support, as required by the amendment to Rule 6, adopted at the December Term, 1871. This might have been a good cause for postponing the hearing to give time for further preparation, if application therefor had been made. Instead of that, a full argument has been filed upon the merits of the motion. No more could be done if the hearing should now be postponed. Under these circumstances we are inclined to treat the filing of the argument as a waiver of the notice required by the rule.

It is next objected that all the parties defendant in the lower court are not parties to this motion to dismiss. The motion is made by the appellees, and is signed by the attorney of the only defendant in the court below who had any

real interest in the litigation, and the only one who filed an answer.

This brings us to the merits of the motion. We have many times decided that an appeal will not lie from a decree dissolving an injunction without dismissing the bill.

In this case the bill was not dismissed. It may have been the intention of the court to dispose of the whole case by the entry as made, but that intention is certainly not expressed. A motion was made to dissolve the injunction upon the bill and answer filed. It does not appear that the case was heard except upon this motion, and there is nothing in the record to show that it will not be still within the power of the Circuit Court upon the dismissal of the appeal to grant the complainants all the relief they ask. The case is still open on its merits. It is only the interlocutory order that has been disposed of. *Appeal dismissed.*

The Lucille, 19 Wall. 73.

Final Decree.

A decree of a Circuit Court in an admiralty case which fixes no sum which the successful party is to recover is not a final decree.

Motion to dismiss granted.

Opinion.—Whatever may be the merit of the objection on which the motion is founded, namely, that the above decree is not for an amount exceeding two thousand dollars, we are of opinion that there is not a final decree from which an appeal can be taken to this court, and that this appeal must for that reason be dismissed.

An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for, is contemplated, a

trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should, therefore, be complete within itself. In the case before us, the decree fixes no sum which the successful party is to recover. If any process is to be issued to enforce it, the clerk must, from the record of the District Court, ascertain the amount, or he can issue no such process. But this is the duty of the court, and not the clerk. It may be said that it is, in such case as this, a mere matter of computation, and in some cases it may be. But the one before us shows that it is not always so, for the only question argued by counsel on this motion is, whether the judgment affirmed is for two thousand or two thousand one hundred dollars—for the amount after the remittitur or before. No final decree of a court which enforces its own judgments ought to be left in such condition that the record of another court is the only evidence of the amount recovered by the successful party. An order affirming a decree in another court is neither in express terms nor by necessary implication a judgment or decree for the amount of the judgment or decree in that court. The costs of the lower court, and the interest on its judgment to the date of the decree or judgment on appeal, are to be added to it, and though they *may* be computed by the clerk, they should have the judicial consideration of the court. According to these views, there is no final decree such as the law intends in the Circuit Court in this case, and the appeal is *Dismissed.*

Mr. JUSTICE CLIFFORD dissented.

WELLS *v.* MCGREGOR, 13 Wall. 188.

FINAL JUDGMENT—TESTE.

A judgment of the Suprem Court of a territory affirming an order of an inferior court resting in the discretion of the inferior court, is not a final judgment within the meaning of the Judiciary Act.

Motion to dismiss granted.

OPINION.—We have often held that such orders as that which the Supreme Court of the Territory of Montana affirmed are within the discretion of the inferior court. They are not final judgments within the meaning of the Judiciary Act of 1789. Of course they are not within the meaning of the 9th section of the organic act of the Territory. It appears also that the writ of error bears the teste of the clerk of the Supreme Court of the Territory of Montana, and not the teste of the Chief Justice of this court. But the statute makes the teste of the Chief Justice indispensable, and we have no power to change its requirements.

On both grounds, therefore, the writ of error must be

Dismissed.

SPARROW *v.* STRONG, 4 Wall. 584.

FINAL JUDGMENT—FORM OF JUDGMENT.

Where a decision purports to affirm a final judgment of an inferior court, but the record shows that the judgment affirmed was not a final judgment, this court has no jurisdiction.

Motion to dismiss granted at regular hearing.

OPINION.—This case was before us at the last term, upon motion to dismiss the writ of error.

The suit originally brought in the District Court for the Territory of Nevada was an action of ejectment for an undivided interest in a mining claim.

Upon trial there was a verdict and judgment for the plaintiff. Subsequently, and in accordance with the statute of Nevada, a motion for a new trial was made, which was denied. An appeal was then taken to the Supreme Court of the Territory, which gave judgment affirming the judgment or decree of the District Court.

We were asked to dismiss the writ upon the ground that this judgment affirmed only the order of the District Court denying the motion for new trial, and was, therefore, not reviewable here.

On opening the record, however, it was apparent that the judgment of the appellate court was, in terms, an affirmance of the judgment or decree of the District Court, and that the only judgment of that court, properly so called, was the judgment for the defendants in the action of ejectment.

A majority of the court declined to look beyond the plain import of the judgment of affirmance, and examine the record farther, in order to ascertain whether there was anything in it which would limit its effect to an affirmance of the order denying the motion for a new trial.

The motion to dismiss was therefore overruled; but we then observed that if the judgment of the Supreme Court was, in substance and effect, nothing more than such an affirmance, this court could not review it; and after stating the familiar rule, that this court will not revise the exercise of discretion by an inferior court, in granting or refusing new trials, we said further: "The circumstances that the discretion was exercised under a peculiar statute, by an appellate court, and upon appeal, cannot withdraw the case from the operation of the principles which control this court."

The cause has now been regularly heard and fully argued, and the first question for our consideration is that which was left undecided at the last term: "What is the true nature and effect of the judgment of the Territorial Supreme Court?"

The record shows an action of ejectment by petition, answer, and replication—the form sanctioned by Territorial law—regularly prosecuted in a Territorial District Court, resulting in a verdict and judgment for the defendants.

The record shows, also, a motion for new trial overruled, and a notice by the plaintiffs to the defendants of an appeal from the order overruling that motion to the Supreme Court of the Territory, and a bond of the plaintiffs, on appeal, reciting the appeal as made from that order.

Under the laws of Nevada appeals are allowed from orders granting or refusing new trials; but it was necessary, before an appeal could be perfected, that a statement of the case, showing the grounds of appeal, should be filed. A statement which had been used on the motion for new trial was accordingly filed, under a stipulation signed by both parties, which recited the notice of appeal as an appeal from the overruling order.

There is no paper in the record which indicates that either party understood that anything was before the appellate court except that order. Nothing else, as it seems, was intended to be brought before it by the appellants, and nothing else was understood to be by the appellees.

If, then, the decision of that court is anything more than an affirmance of the order of the District Court, it is not what was expected by either party. It must not, therefore, be held to be more, unless the principles of legal construction clearly require it.

Its terms, indeed, import an affirmance of the original judgment; but are they incompatible with a more limited sense? The decision is loosely and inaccurately expressed. It purports to affirm a judgment and decree; but there was no decree, in any proper sense of the word, in the District Court. The words "judgment and decree" must, therefore, have been used as equivalents; and "judgment," in such a

connection, may well have been regarded as the equivalent of "decision or order."

It is probable, we think, that the court intended that its judgment should be understood as a simple affirmance of the order below. And such seems to have been the understanding of the appellants; for, in their prayer for a citation, on appeal to this court, they describe their "appeal" to the Supreme Court of the Territory as "taken for the reversal of the order," in the District Court, and state that judgment was given "affirming the order." We impose, then, no impossible or even unnatural sense on the terms of the judgment, especially when considered in connection with the whole record, when we hold it, as we do, to be nothing else than an affirmance of the order overruling the motion for new trial.

But, it was argued at bar, with ingenious ability, that this judgment, if admitted to be merely an affirmance of the order of the District Court, was, nevertheless, a final judgment, subject to review, on a writ of error, by this court. It was insisted, that under the peculiar legislation of Nevada, an appeal from an order denying a motion for a new trial carried the original judgment and the whole cause before the appellate court, and that the decision, upon appeal, operated as a judgment, reversing or affirming the judgment below.

But we do not so understand that legislation. The statutes of Nevada directed the judgment to be entered within twenty-four hours after verdict, unless there was a stay of proceedings; and the direction of the statutes was observed in this case. But those statutes also provided for a motion for new trial after judgment; and the effect of granting the motion was to vacate the judgment and verdict, as in the ordinary practice it would vacate the verdict only, and so prevent the entry of judgment. With this exception, the proceeding, on motion for new trial in the court of original jurisdiction, was not distinguishable, in any important respect, from the like proceeding in the District and Circuit Courts of the United States.

There was, however, another peculiarity in respect to the finality of the proceeding. In the latter courts, the decision upon such a motion is without appeal. In the District Court of Nevada, an appeal might be taken to the Supreme Court; and, as we have seen, in case of such appeal, a statement, showing the grounds of it, must be filed in order to perfect the proceeding.

But there is nothing in the statutes which gives, in terms, any other or different effect to the reversing or affirming order of the appellate court than would attend the allowance or denial of the motion in the inferior court. Nor is there anything in the statutes which seems intended to give by implication any such other or different effect. On the contrary, the statutes provide for the ordinary mode of reversing the judgments of inferior courts by appellate tribunals upon writs of error; which would hardly have been done if it was intended to give the same effect to appeals from decisions upon motions for new trials.

Decisions on such motions, by the District Courts, were required to be made upon such grounds of law and facts as the case might furnish; and upon like grounds were the decisions of the Supreme Court, upon appeal, required to be made. We cannot doubt that the decision of the District Court, in such a case, was the exercise of a discretion not reviewable in the Territorial Supreme Court, except under an express statute of the Territory. And we are obliged to think that the decision of the appellate court was equally an exercise of discretion upon the law and the facts, and not reviewable here in the absence of any act of Congress authorizing appeals in such cases.

This view of the preliminary question makes it unnecessary to examine the other important points in the case, which have been so ably and exhaustively discussed by counsel. We think the judgment of the Supreme Territorial Court only an order affirming the order of the District Court denying a

motion for new trial, and that it is therefore not reviewable here on error. *Writ dismissed.*

BROWN *v.* WILEY, 4 Wall. 165.

FINAL JUDGMENT.

Exceptions to rulings upon trial of issues of fact certified from the Orphans' Court of the District of Columbia to the Circuit Court, cannot be re-examined here upon a writ of error sued out upon an order certifying the findings of the jury to the Orphans' Court.

Motion to dismiss granted.

OPINION.—This cause is before us upon a motion to dismiss the writ of error.

On the 10th of February, 1863, certain issues of fact were sent by the Orphans' Court of Washington County, District of Columbia, to the Circuit Court of the District to be tried by a jury.

These issues were transferred, by the act of Congress of March 3d, 1863, to the Supreme Court of the District of Columbia, and were brought to trial in November, 1865, before that court, held by a single judge in special term. All the issues were determined in the affirmative by the jury under the rulings of the judge. Exceptions were taken to the rulings, and a motion for a new trial was made in general term before all the judges, and was overruled. Subsequently, an order was made at special term certifying the finding of the jury on the issues to the Orphans' Court.

The record of these proceedings is brought here by writ of error.

The case, in almost every particular, is identical with that of Van Ness *v.* Van Ness, 6 How. 62. In that case, as in this, an issue of fact was sent out of the Orphans' Court to the Circuit Court to be tried by a jury; was tried and found in the negative. Exceptions were taken to the rulings upon

the trial, and an order was made certifying the finding to the Orphans' Court. The proceeding was brought into this court by writ of error, which was dismissed for want of jurisdiction.

It is true that in the case before us the exceptions were taken to the rulings at special term, and that a motion for new trial was heard at general term, and was denied, whereas it does not appear that there was any motion for new trial in the case of Van Ness, and it was insisted in argument that this difference in proceeding distinguishes the two cases, so that the latter cannot be regarded as an authority in the decision of the former.

We are unable to perceive that the difference is material. The order certifying the finding to the Orphans' Court in the case of Van Ness, was identical in effect with the two orders overruling the motion for new trial, and certifying the finding in the case before us. In each case the exceptions taken at the trial before the jury were overruled, and nothing was left for action in the court before which the issues were tried; but the cause went to the Orphans' Court for final judgment.

In that case it was held that the order was not one which could, under the act, be re-examined on writ of error, and we see no reason for a different ruling in this.

It was argued that the act organizing the Supreme Court of the District gives this court jurisdiction of this case by writ of error. We do not think so. That act expressly provides that any final judgment, order, and decree of the District Supreme Court may be re-examined upon writ of error or appeal, "in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the District Circuit Court."

It is clear, therefore, that the action of the former court can be re-examined here in no case in which like action in the latter court could not be re-examined.

The only real difference between the two statutes is that the latter gives an appeal from a decision of the single judge at special term, on a motion for new trial, to the whole court at general term, or secures an original hearing of the motion in general term. This is an advantage to the unsuccessful party not formerly enjoyed, but it makes no changes as to re-examination upon appeals or writs of error in this court.

The court has considered the motion for a *certiorari* to supply alleged defects in the record; but, after a careful comparison of the suggestions of counsel with the record before us, and the act establishing the Supreme Court for the District of Columbia, we are satisfied that the granting of the motion would avail nothing to the plaintiff in error. It must, therefore, be overruled. And the writ of error must be *Dismissed for want of jurisdiction.*

HUMISTON *v.* STAINTHORP, 2 Wall. 106.

FINAL DECREE—INFRINGEMENT OF PATENT.

In a suit for infringing a patent, this court has no jurisdiction to review a decree awarding an injunction and directing a master to ascertain and report to the court the amount of gains and profits.

STATEMENT.—This was a bill in equity for infringing a patent. The decree awarded an injunction and an account, and referred the cause to a master to ascertain and report to the court the amount of gains and profits. An appeal was taken, and a motion was made to dismiss it for want of jurisdiction.

BY THE COURT: The decree is not final within the act of Congress providing for appeals to this court, according

to a long and well-settled class of cases, some of which we only need refer to in disposing of the case.

Motion granted.

(See 2 Wall. 106 and star reference.)

BRADSTREET CO. *v.* HIGGINS, 112 U. S. 227.

AMOUNT—COUNTER-CLAIM.

Where the judgment below and counter-claims of the plaintiff in error together amount to more than five thousand dollars, this court has jurisdiction. But where the bill of exceptions shows that the evidence offered in support of the counter-claims only tended to prove claims which, added to the judgment, amount to less than five thousand dollars, this court has not jurisdiction.

Motion to dismiss granted.

OPINION.—The record shows that Higgins, the defendant in error, brought suit against the Bradstreet Company for eight thousand dollars, the price and value of certain property of his which the company had appropriated to its own use. The answer of the company contained, first, a general denial of the allegations of the petition; second, a counter-claim of one thousand one hundred and four dollars and eighteen cents for money collected by Higgins for the use of the company and not paid over; and third, a counter-claim of one thousand eight hundred and thirty-three dollars and forty-two cents, the expenses of the office of the company at Kansas City over its receipts, which Higgins, as superintendent of the office, was bound to pay. Higgins in his reply admitted the first counter-claim, and consented to its being applied as a credit upon the demand for which his suit was brought. As to the second counter-claim, his defense was, in effect, that the legitimate expenses of the office at Kansas City while he was superintendent, which he was

bound to pay, did not exceed its legitimate receipts. Upon these issues a trial was had, which resulted in a verdict and judgment in favor of Higgins for three thousand three hundred and thirty-three dollars and ninety-two cents. Upon the trial a bill of exceptions was taken by the company, from which it appears that evidence was introduced by the company "tending to show that the legitimate expenses of the Kansas City office exceeded its receipts during the time plaintiff acted as its superintendent in the sum of sixty-one dollars and ten cents, including plaintiff's salary of one hundred dollars per month as expenses." This writ of error was brought by the company, and Higgins now moves to dismiss because the value of the matter in dispute does not exceed five thousand dollars.

In Hilton *v.* Dickinson, 108 U. S. 165, it was decided, on full consideration, that our jurisdiction for the review of judgments and decrees of the circuit courts in this class of cases depends on the value of the matter in dispute here, and that it is the actual matter in dispute, as shown by the whole record, and not the *ad damnum* alone, which governs. Here the recovery against the company was less than five thousand dollars, and that, according to all the cases which were fully collected and commented on in Hilton *v.* Dickinson, is not of itself enough to give us jurisdiction. The right of the company to bring the case here, therefore, depends on the jurisdictional effect of its various counter-claims. As the first of these claims was admitted by Higgins in his reply, there could not have been below, and there cannot be here, any dispute about that. The conclusive presumption upon the record is that the amount of this claim was credited upon the sum found due from the company for the property about which the suit was brought, and the verdict and judgment given only for the balance remaining after that deduction was made. As to the second, the record shows that while the claim in the pleadings was for one thousand eight hundred

and thirty-three dollars and forty-two cents, the evidence introduced in support of it only tended to prove that there was sixty-one dollars and ten cents due from Higgins on that account. The dispute in this court, therefore, according to the record, is, first, as to the right of Higgins to retain his judgment against the company for three thousand three hundred and thirty-three dollars and ninety-two cents, and, second, as to the right of the company to recover sixty-one dollars and ten cents from Higgins. As these two sums combined do not make five thousand dollars, it is clear we have no jurisdiction, and the motion to dismiss must be granted. Had it not been for the statement in the bill of exceptions, which, in effect, limited the counter-claim to the amount which the evidence tended to prove, the case would have been different, for then it would have appeared that the company might have been entitled to recover the whole amount of one thousand eight hundred and thirty-three dollars and forty-two cents, after defeating the entire claim of Higgins, thus making the apparent value of the matter in dispute here in excess of our jurisdictional requirements. As it is, however, we can look only to the statement in the bill of exceptions of what the amount in dispute under this claim actually was.

Dismissed.

ALABAMA GOLD LIFE INSURANCE COMPANY *v.* NICHOLS, 109 U. S. 232.

AMOUNT—REMITTITUR.

Where the judgment of the United States Circuit Court sitting in Texas is for more than five thousand dollars, it is within the discretion of that court to allow a remittitur and so reduce the amount of the judgment as to prevent this court from taking jurisdiction.

Motion to dismiss granted.

OPINION.—In this case a verdict was rendered against the plaintiff in error for six thousand six hundred and ten dol-

lars, and a judgment entered thereon December 9th, 1879 In the verdict was included, for damages, six hundred dollars; attorney's fees, five hundred dollars; and interest, five hundred and ten dollars; in all, one thousand six hundred and ten dollars. The next day, December 10th, 1879, the defendants in error appeared in open court and "entered a remittitur" of these amounts, "leaving the amount of said judgment to be for the amount of five thousand dollars and costs of suit." Upon this being done a new judgment was entered "that the plaintiffs have and recover from said defendant the sum of five thousand dollars, and also costs about this suit incurred as of the date of said judgment, and have execution therefor instead of the sum of six thousand and six hundred and ten dollars, and also all costs about this suit incurred as in said judgment is recited." This writ of error was brought on the 8th of January, 1880, to reverse the judgment so entered. The defendant in error now moves to dismiss the writ because the value of the matter in dispute does not exceed five thousand dollars.

The judgment as it stands is for five thousand dollars and no more. The entry of the 10th of December is equivalent to setting aside the judgment of the 9th and entering a new one for the amount remaining due after deducting from the verdict the sum remitted in open court. There was nothing to prevent this being done during the term and before error brought. The judgment of the 10th is, therefore, the final judgment in the action.

In Thompson *v.* Butler, 95 U. S. 694–696, it was said:

"Undoubtedly the trial court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and if the object of the reduction is to deprive an appellate court of its jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be

shut out from our re-examination in cases where our jurisdiction depends on the amount in controversy."

Articles 1351 and 1352 of the Revised Statutes of Texas are as follows:

"Article 1351. Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted.

"Article 1352. Any person in whose favor a judgment has been rendered may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted." Revised Statutes of Texas, 1879, pp. 211, 212.

Without deciding what effect these statutes will have on our jurisdiction in cases coming up from that State, if the amount is remitted after judgment, without any action thereon by the court other than noting on the docket and entering on the minutes what has been done, we are of opinion that it is within the discretion of a court of the United States sitting in that State, if a plaintiff appears in open court and remits a part of a verdict in his favor, to make the proper reduction and enter judgment accordingly. That was the effect of what was done in this case, and the rule established in Thompson *v.* Butler, *supra*, applies.

The motion to dismiss is therefore granted.

Dismissed.

NEW JERSEY ZINC COMPANY *v.* TROTTER, 108 U. S. 564.

AMOUNT.

In an action of trespass, there being no claim of title in the pleadings, the money value adjudged against the defendant, and not the value of the land, determines the jurisdiction of this court.

Motion to dismiss granted.

OPINION.—This was an action of trespass brought by Trotter to recover damages of the New Jersey Zinc Company for entering on his lands and digging up and carrying away a quantity of franklinite ore. There were three counts in the declaration: two *quare clausum fregit* and one *de bonis asportatis*. The plea was not guilty. No other issue was raised by the pleadings. Neither party set up title, so that the only matter in dispute was the liability of the zinc company to pay for the ore which it was alleged had been wrongfully taken and carried away. Trotter recovered a judgment for three thousand three hundred and twenty dollars damages and seven hundred and fifty-two dollars and twenty-five cents costs of suit. From that judgment the zinc company brought this writ of error, which Trotter now moves to dismiss because the value of the matter in dispute does not exceed five thousand dollars.

As we decided at the present term in Hilton *v.* Dickinson, *ante*, 165, our jurisdiction is determined by the value of the matter in dispute in this court, and the matter in dispute here in the present case is the judgment below for less than five thousand dollars. It may be that the question actually litigated below related to the title of the parties to the land from which the ore in controversy was taken, and that the verdict will be conclusive on that question as an estoppel in some other case; but, as was also said at the present term, in Elgin *v.* Marshall, 106 U. S. 578, for the purpose of estimating the value on which our jurisdiction depends, reference

can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered, and we are not permitted to consider the collateral effect of the judgment in another suit between the same or other parties. It is the money value of what has been actually adjudged in the cause that is to be taken into the account, not the probative force of the judgment in some other suit. Here the thing, and the only thing, adjudged is that the zinc company was guilty of the particular trespass complained of, and must pay Trotter three thousand three hundred and twenty dollars for the ore taken away. Had the zinc company pleaded title to the land from which the ore was taken, and issue had been joined on that plea, a different question would have been presented. In that way, the land might have been made the matter for adjudication, and thus the matter in dispute on the record. But, as this case stands, only the possession of Trotter and his right to the ore are involved. It may be that, in order to find possession in Trotter, the jury were compelled to find that he had title to the land, and that in this way the verdict and judgment may estop the parties in another suit, but that will be a collateral, not the direct, effect of the judgment.

The motion to dismiss is granted.

HILTON *v.* DICKINSON, 108 U. S. 165.

AMOUNT—CROSS-APPEALS—INTEREST OF PARTY MOVING TO DISMISS—NEGLIGENCE IN PROSECUTING AN APPEAL.

This court has jurisdiction of a writ of error or an appeal by a plaintiff below—if he failed to recover, or recovered in part only—when the amount sued for and which he failed to recover equals or exceeds its jurisdictional limit; and by a defendant below, when the recovery against him equals or exceeds that limit, or his set-offs or counter-claims equal to, or exceeding such limit, are defeated.

Motion to dismiss granted.

OPINION.—At the last term, in the case of The S. S. Osborne, 105 U. S. 447, it was decided that "Cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered, and giving the security required by the rules." In that case, the appeal had been docketed, but long after the time when by law it should have been done, and, following the rule announced in Grigsby *v.* Purcell, 99 U. S. 505, it was dismissed for want of prosecution. Inasmuch, therefore, as we would not hear the cross-appeal if it should be entered at this time, we deny the motion of Devlin to have the appearance of counsel entered on that appeal, and of our own motion dismiss it for want of prosecution.

It is a matter of no importance that the motion to dismiss the appeal of Hilton is made by Dickinson after he has parted with his interest in the decree, for if on looking into a record we find we have no jurisdiction, it is our duty to dismiss on our own motion without waiting the action of the parties. The question is then presented whether upon the face of this record it appears that the value of the matter in dispute, for the purpose of our jurisdiction, exceeds two thousand five hundred dollars, and that depends on whether the "matter in dispute" is the whole amount claimed by Hilton below, or only the difference between what he has recovered and what he sued for. So far as we have been able to discover, this precise point has never before been passed upon in any reported case. There are expressions in the opinions of the court in some cases which may be, and probably are, broad enough to sustain the jurisdiction, but these expressions are found where the facts did not require a decision of the question now formally presented.

In Wilson *v.* Daniel, decided in 1798, and reported in 3 Dallas, 401, upon a writ of error brought by a defendant below from a judgment against him for less than two thou-

sand dollars, it was held that the jurisdiction of this court depended not on the amount of the judgment, but "on the matter in dispute when the action was instituted." Chief Justice Ellsworth, in his opinion, said:

"If the sum or value found by a verdict was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than two thousand dollars was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right of removal and revision of the cause, his demand (which is alone to govern him) being for more than two thousand dollars. It is not to be presumed that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation which has been pronounced."

Mr. Justice Iredell, in a dissenting opinion, thus states the argument on the other side:

"The true motive for introducing the provision which is under consideration into the Judicial Act is evident. When the legislature allowed a writ of error to the Supreme Court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided that unless the matter in dispute exceeded the sum or value of two thousand dollars, a writ of error should not be issued. But the matter in dispute here meant is the matter in dispute on the writ of error."

In Cooke *v.* Woodrow, 5 Cranch, 13, decided in 1809, trover had been brought in the Circuit Court of the District of Columbia for sundry household goods, and the judgment was in favor of the defendants. Upon a writ of error by the plaintiff below, a question arose as to the way in which the value of the matter in dispute should be ascertained,

and Chief Justice Marshall, in announcing the decision, said:

"If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but when the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value."

Three years afterward the case of Wise & Lynn *v.* The Columbian Turnpike Company was before the court, which is very imperfectly reported in 7 Cranch, 276. On referring to the original record, we find that under a provision of the charter of the turnpike company, 2 Stat. 572, chap. 26, § 6, commissioners were to be appointed by the Circuit Court of the District of Columbia to decide upon the compensation to be paid the owners of land for damages growing out of the appropriation of their property to the use of the company. All awards of the commissioners were to be filed in the Circuit Court, and unless set aside by the court were to be final and conclusive between the parties and recorded by the clerk. Wise & Lynn presented a claim to the commissioners, and were awarded forty-five dollars. On the return of the award to the court they filed exceptions, and, among other things, claimed that they should have been allowed at least three hundred dollars, but the court confirmed the award. They then brought the case to this court by writ of error, and the turnpike company moved to dismiss, because the value of the matter in dispute did not exceed one hundred dollars, that being then the jurisdictional limit on appeals and writs of error from the Circuit Court of the District of Columbia. The decision of the case is reported as follows:

"It appearing that the sum awarded was only forty-five dollars, the court, all the judges being present, decided that they had no jurisdiction, although the sum claimed by Wise & Lynn, before the commissioners of the road, was more than one hundred dollars."

In Peyton *v.* Robertson, 9 Wheat. 527, replevin had been brought for the recovery of personal property distrained for rent. The defendant in the action acknowledged the taking of the goods as charged in the declaration, but justified it as a distress for the sum of five hundred and ninety-one dollars due for rent in arrear, and recovered a judgment against the plaintiff for that amount. The plaintiff then brought the case to this court by writ of error, and insisted that as the damages laid in the declaration exceeded the jurisdictional limit, his writ ought not to be dismissed; but the court said, through Chief Justice Marshall:

"If the replevin be, as in this case, of property distrained for rent, the amount for which the avowry is made is the real matter in dispute. The damages are merely nominal. If the writ be issued as a means of trying the title to property, it is in the nature of detinue, and the value of the article replevied is the matter in dispute."

The writ of error was accordingly dismissed.

The case of Gordon *v.* Ogden, 3 Pet. 33, was decided in 1830. There the action was instituted for the violation of a patent, and the amount of the recovery in damages was four hundred dollars, by the verdict of a jury. The damages laid in the declaration were two thousand six hundred dollars. The defendant brought the writ of error, and on a motion to dismiss, because the value of the matter in dispute was not enough to give jurisdiction, Chief Justice Marshall, speaking for the court, said:

"The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the Circuit Court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defend-

ant in the original action, the judgment of this court can only affirm that of the Circuit Court, and consequently the matter in dispute cannot exceed the amount of the judgment. Nothing but that judgment is in dispute between the parties."

Then referring to Wilson *v.* Daniel, *supra*, he said:

"Although that case was decided by a divided court, and although we think that, upon the true construction of the twenty-second section of the Judicial Act, the jurisdiction depends upon the sum in dispute between the parties, as the case stands upon the writ of error, we should be much inclined to adhere to the decision in Wilson *v.* Daniel, had not a contrary practice since prevailed. . . . The case of Wise & Lynn *v.* The Columbian Turnpike Company, 7 Cranch, 276, was dismissed because the sum for which judgment was rendered in the Circuit Court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the Circuit Court, was sufficient. . . . Since this decision we do not recollect that the question has ever been made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court."

The writ of error was consequently dismissed, all the judges agreeing that there was no jurisdiction. This case was followed at the same term in Smith *v.* Honey, 3 Pet. 469.

Nothing further of importance connected with the particular question we are now considering appears in the reported cases until 1844, when, in Knapp *v.* Banks, 2 How. 73, which was a writ of error brought by a defendant against whom a judgment had been rendered for less than two thousand dollars, Mr. Justice Story said for the court:

"The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding two thousand dollars, and the *ad damnum* exceeds two thousand dollars, if, by reason of any erroneous ruling of the court below the plaintiff recovers nothing, or less than two thousand dollars, there the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than two thousand dollars, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given, and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The rule, as thus stated by Mr. Justice Story, was cited in Walker *v.* The United States, 4 Wall. 163, and in Merrill *v.* Petty, 16 Wall. 338. But these were cases in which the question was as to the right of a defendant to bring up for review a judgment against himself for less than two thousand dollars.

In Ryan *v.* Bindley, 1 Wall. 66, the plaintiff below sued for two thousand dollars, and the defendant pleaded set-off to the amount of four thousand dollars. Under such a plea, if the set-off had been sustained, the defendant would have been entitled to a judgment for the difference between the amount of his claim and that established by the plaintiff. The plaintiff recovered a judgment for five hundred and seventy-five dollars and eighty-five cents, and the defendant brought a writ of error, upon which jurisdiction was sustained because the defendant sought to defeat the judgment against him altogether, and to recover a judgment in his own favor and against the plaintiff for at least two thousand dollars, and possibly four thousand dollars. Thus the matter in dispute in this court exceeded two thousand dollars.

In Pierce *v.* Wade, 100 U. S. 444, the action was replevin for cattle. A judgment was rendered in favor of the plaintiffs for most of the cattle taken on the writ, but against them for one thousand four hundred dollars, the value of some that were taken which did not belong to them. They brought the case here by writ of error, but the writ was dismissed on the ground that the matter in dispute was only the part of the cattle for which judgment had been rendered against the plaintiffs, the court remarking that "the plaintiffs recovered everything else which they claimed, and the judgment against them is less than five thousand dollars."

In Lamar *v.* Micou, 104 U. S. 465, where the appeal was taken by a defendant from a decree against him for less than five thousand dollars, it was held that if the set-off or counter-claim relied on would only have the effect of reducing the amount of the recovery, without entitling the defendant to a decree in his own favor, there was no jurisdiction.

We understand that Wilson *v.* Daniel is overruled by Gordon *v.* Ogden, in which Chief Justice Marshall states the opinion of the court to be that "the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error," and that Wilson *v.* Daniel was not followed because "a contrary practice had since prevailed." It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. . . . Under this rule it has always been assumed, since Cooke *v.* Woodrow, *supra*, that when a defendant brought a case here the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied; and this because as to him jurisdiction depended

on the matter in dispute here. If the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record would show that he had been successful below as to a part of his claim, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case.

We are unable to see any difference in principle between the position of a plaintiff and that of a defendant as to such a case. The plaintiff sues for as much, or more than the sum required to give us jurisdiction, and recovers less. He does not, any more than a defendant, bring a case here to secure what he has already got, but to get more. If we take a case for him when the additional amount he asks to recover is less than we can consider, he has "an advantage over his antagonist," such as, in the language of Chief Justice Ellsworth, *supra*, "it is not to be presumed it was the intention of the legislature to give." Such a result ought to be avoided, and it may be by holding, as we do, that, as to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute "between the parties as the case stands upon the writ of error" or appeal, that is to say, as it stands in this court. That was the question in Wilson *v.* Daniel where it was held that, to avoid giving one party an advantage over another, it was necessary to make jurisdiction depend "on the matter in dispute when the action was instituted." When, therefore, that case was overruled in Gordon *v.* Ogden, and it was held, as to a defendant, that his rights depended on the matter in dispute in this court, we entertain no doubt it was the intention of the court to adopt as an entirety the position of Mr. Justice Iredell in his dissenting opinion, and to put both sides upon an equal footing. Certainly it could not have been intended to give a plaintiff any

advantage over a defendant, when there is nothing in the law to show any such superiority in position.

Under this rule we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. In this connection, it is to be remarked that the "amount as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction." Lee *v.* Watson, and the other cases cited in connection therewith, *supra.* The same is true of the counter-claim or set-off. It is the actual matter in dispute as shown by the record, and not the *ad damnum* alone, which must be looked to.

Applying this rule to the present case, it is apparent we have no jurisdiction. The original matter in dispute was three thousand dollars. On appeals from the Supreme Court of the District of Columbia we have jurisdiction only when the matter in dispute exceeds two thousand five hundred dollars. Hilton recovered below one-half of the three thousand dollars. It follows that as to him the matter in dispute in this court is only one thousand five hundred dollars.

The appeal of Hilton is dismissed for want of jurisdiction, and that of Devlin for want of prosecution.

YOUNGSTOWN BANK *v.* HUGHES, 106 U. S. 523.

AFFIDAVITS—AMOUNT—MONEY VALUE.

A claim of immunity from testifying has no money value.

Affidavits may be used as evidence of value, only when the matter in dispute has a money value.

Motion to dismiss granted.

OPINION.—Section 2782 of the Revised Statutes of Ohio (1880) provides, that if a county auditor has reason to believe or is informed that any person has given to a tax-assessor a false statement of his personal property, moneys, etc., or that the assessor has made an erroneous return of any property, moneys, etc., which are by law subject to taxation, he may proceed to correct the return and to charge such persons on the tax duplicate with the proper amount of taxes. "To enable him to do which he is . . . authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys, or credits, investments in bonds, stocks, joint-stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return."

Section 2783 provides for process of subpœna in case any person shall neglect to appear and testify when called on by the auditor, and for punishment for contempt.

Under the authority of this statute the auditor of Mahoning County, in the exercise of his power to charge persons on the tax duplicate with the proper amount of taxes, called on the cashier of the First National Bank of Youngstown to appear and testify, and, because he could not testify without, to bring with him, the books of the bank showing its deposits. Thereupon the bank filed a bill in equity to enjoin the auditor, alleging for cause that such a proceeding

on his part would unlawfully expose its business affairs, lessen public confidence in it as a depository of moneys, diminish its deposits, and greatly impair the value of its franchises. The Circuit Court dismissed the bill, and the bank appealed. A motion is now made to dismiss the appeal for want of jurisdiction, because the value of the matter in dispute does not exceed five thousand dollars.

In Barry *v.* Mercein, 5 How. 103, it was decided that to give this court jurisdiction in cases dependent upon the amount in controversy, "the matter in dispute must be money or some right, the value of which in money can be calculated and ascertained." . . .

The present suit is not for money, nor for anything the value of which can be measured by money. The bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the auditor and the bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the bank would be in the highest degree remote and speculative. Certainly no suit for even nominal damages could be sustained against the auditor on account of what he had done. All the cashier is required to do is to give testimony in a proceeding instituted under the authority of law by the auditor to perfect the tax lists of the county. It is supposed the books of the bank contain evidence pertinent to this inquiry, and appropriate measures are taken to have them produced for examination. The case is in no respect different in principle from what it would be if the evidence was called for in an ordinary suit in a court of justice between individuals.

Affidavits can only be used to furnish evidence of value not appearing on the face of the record when the nature of the matter in dispute is such as to admit of an estimate of its value in money. *Appeal dismissed.*

SCHWED *v.* SMITH, 106 U. S. 188.

AMOUNT—SEVERAL INTERESTS JOINED IN ONE SUIT.

Where several parties join in one suit on several claims, which aggregate more than five thousand dollars, but none of which exceed that sum, the amount involved is not sufficient to give this court jurisdiction.

Motion to dismiss granted.

OPINION.—It is impossible to distinguish this case in principle from Seaver *v.* Bigelows, 5 Wall. 208, where an appeal by creditors who had joined in a suit to set aside a fraudulent conveyance by their debtor was dismissed because the amounts found due the appellants, respectively, were less than our jurisdictional limit. In delivering the opinion of the court, Mr. Justice Nelson said: "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment. . . . The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." In the present case the judgment creditors did succeed, and, in effect, each recovered a decree against Heller, setting aside his judgment so far as it affected them individually. Had they been defeated they could not have appealed, because, although allowed in equity to join in their suit, they had "separate and distinct interests depending on separate and distinct judgments," as well as separate and distinct attachments. But if the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action.

The appeal in Seaver *v.* Bigelows was from a decree against the creditors, but, in deciding the case, the court in express terms adopted the analogous practice in admiralty, where, under certain circumstances, separate and distinct causes of action may be united in one suit, and in that practice it has always been held that the shipowner cannot unite the separate decrees against him in a suit to make up the amount necessary for our jurisdiction on appeal. That question was fully considered in *Ex parte* Baltimore and Ohio Railroad Company, *ante*, p. 5. Although the effect of the decree is to deprive Heller in the aggregate of more than five thousand dollars, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense. *Motion granted.*

PARKER *v.* MORRILL, 106 U. S. 1.

AMOUNT—PARTITION—QUIA TIMET.

In a proceeding to quiet title and for partition, where the interest of the party appealing does not appear to be of the value of five thousand dollars, this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—This is a motion to dismiss for the reason that it does not appear in the record or by affidavits that the value of the matter in dispute exceeds five thousand dollars. The record shows that Willard Parker, Jr., the appellant, as the owner of one undivided twentieth part of a large tract of land in West Virginia, embracing within it boundaries several hundred thousand acres, filed his bill in equity against Willard Parker, Sr., as the owner of the remaining nineteen-twentieths, and Morrill, the appellee, for a partition as between himself and Parker, Sr., and to remove a cloud upon the title to a part of the tract caused by a claim set up by

Morrill. Upon the hearing the court below dismissed the bill as to Morrill, and from a decree to that effect Parker, Jr., took this appeal. Parker, Sr., did not appear as an actor in the court below, and has not united in the appeal.

The lands claimed by Morrill are not described either in the bill or in the answer of Morrill, otherwise than by reference to certain patents under which he assumed to hold. These patents covered between fifty and sixty thousand acres. In one of the depositions it is shown that when the suit was begun Morrill claimed about twenty-five thousand acres. The value of the property is nowhere stated. The whole tract in which Parker, Jr., claimed his undivided interest included very much more than the Morrill lands. On the 11th of January, 1854, this whole tract was conveyed to Peter Clark by deed reciting a consideration of three thousand and ninety dollars. Clark, on the 29th of March, 1854, conveyed it to William W. Campbell by deed, in which the consideration is stated to have been eight thousand dollars. On the 5th of May, 1858, Campbell conveyed to Parker, Sr., for a nominal consideration, and on the 2d of November, 1872, Parker, Sr., conveyed the one undivided twentieth to Parker, Jr., for two thousand dollars. In his petition for this appeal, filed September 8th, 1880, Parker, Jr., states the value of the lands claimed by Morrill to be over two thousand dollars. Notice of the present motion was served on the counsel for the appellant in May last. The brief in support of the motion was filed here on the 6th of May. That of the appellant was filed on the 7th of October. Notwithstanding the dismissal was claimed on account of the value of the matter in dispute, no attempt has been made by the appellant to supply the defect in the record by affidavits, as under our practice might have been done, but to defeat the motion he relies entirely on the evidence of value to be found in the record.

As the case stands, only the interest of Parker, Jr., in the

lands is in question here. This is one undivided twentieth part only. As Parker, Sr., has not appealed, the value of his interest in the property cannot be taken into the account. The claim of Morrill is only for twenty-five thousand acres. One-twentieth of this would be twelve hundred and fifty acres, and certainly, in the light of the facts appearing all through the record, we cannot say that their value exceeds five thousand dollars. *Appeal dismissed.*

THE "MAMIE," 105 U. S. 773.

AMOUNT—ADMIRALTY.

In several suits brought in a State court, against the owners of a yacht, by several parties, each claiming five thousand dollars damages, the yacht being worth less than five thousand dollars, the amount in dispute in this court, on appeal from an order of a Circuit Court dismissing a petition of the owners to limit their liability to the amount of their interest in the yacht, is the full amount of all the claims against the owners of the yacht.

Motion to dismiss denied.

OPINION.—The record has not been printed, but the value of the matter in dispute, as shown by the briefs submitted, is at least the full amount of all the claims against the owners of the "Mamie" in the several suits which it was the object of this proceeding to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of five thousand dollars.

Motion denied.

CHATFIELD *v.* BOYLE, 105 U. S. 231.

AMOUNT—CREDITOR'S BILL.

In a creditor's bill, each creditor appealing represents the amount of his own claim only, and if it is not more than five thousand dollars this court has no jurisdiction.

Motion to dismiss granted.

OPINION.—Boyle & Co., a mercantile firm doing business at Memphis, Tenn., being insolvent, made, on the 17th of November, 1876, a general assignment to J. A. Omberg for the benefit of all their creditors. A deed of trust, in the nature of a mortgage, had been previously executed, conveying some of the property of the firm as security for a debt said to be owing to Jefferson Davis. At the time of this assignment, the total indebtedness of the firm to creditors other than Davis and another person who has since been paid out of securities he held at the time was $17,233 63

The debt claimed to be due Davis was . . . 25,000 00

Making a total of $42,233 63

Chatfield and Woods, creditors of the firm to the amount of three thousand four hundred and forty dollars and thirty-seven cents, filed a bill in equity in one of the State courts of Tennessee, on the 13th of January, 1877, against Boyle, Davis, and others, the object of which was to set aside the deed of trust in favor of Davis, and also to prevent him from participating in the benefits of the general assignment, on the ground that he was not in reality a creditor of the firm, but one of the partners. This suit was brought, as alleged, in aid of the assignment, and in behalf of all the creditors of the firm who might be entitled to come and join therein. Omberg, the assignee, was also joined as a complainant. As to him, the allegations in the bill are as follows: "Complainant, J. A. Omberg, as the assignee in said deed of assignment, comes at the request of the creditors as aforesaid, and claims the benefit of all the matters and circumstances in this bill set up in behalf of all the creditors of Boyle & Co., and especially in behalf of all those creditors who may be hereafter made parties hereto, and may by proper averments and proof make good their claim to be paid out of the proceeds of the property hereby proceeded against, and asks for them, and each of them, all the relief,

under and by virtue and in aid of said assignment, to which they or either or each of them may as creditors be entitled as against defendant Davis or other defendants."

During the pendency of the suit in the State court the property held under the trust for the benefit of Davis was sold with the consent of all parties, and realized two thousand nine hundred and fifty-one dollars and ten cents, which is now in court subject to any decree that may be finally rendered. The assignee has also disposed of all the remaining property embraced in the assignment, and in the distribution that has been made of the proceeds, three thousand four hundred and three dollars and eighty-one cents was set apart for Davis, if he shall be adjudged to be a creditor of the firm and not a partner. These two sums, amounting in the aggregate to six thousand three hundred and fifty-four dollars and ninety-one cents, constitute the entire fund about which the dispute in the case arises.

On the 16th of March, 1877, the Powers Paper Company, Edwin Hoole, and L. Snider & Sons, also creditors of the firm, were, on their own petition, admitted as parties complainant. Their claims were respectively as follows:—

Powers Paper Company, ...	$2,689 60
Edw. Hoole, ...	1,232 61
L. Snider & Sons, ...	1,103 76

On the 23d of March, 1877, the following order was entered in the suit: "In this cause it appearing to the court, by a statement of J. A. Omberg, that all the creditors who have demanded of James A. Omberg, the assignee, to join in this litigation have come in and had themselves made parties therein, it is, therefore, on motion, ordered that this bill be dismissed, so far as said Omberg is concerned, and he go hence without day."

On the next day, March 24th, S. A. Tower & Co. and H.

B. Graham & Brothers were on their petitition made parties. Their claims are as follows:—

S. A. Tower & Co., ...	$887 68
H. B. Graham & Brothers, ...	318 41

No other parties have ever appeared to claim the benefit of the suit. The aggregate of all the several claims represented by all the complainants is nine thousand six hundred and seventy-two dollars and forty-three cents.

On the 4th of April, 1877, after Omberg had been dismissed from the case, the remaining complainants united in a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee, which was afterward effected. Answers were filed and testimony taken in the Circuit Court. Upon final hearing the bill was dismissed. From the decree to that effect all the complainants united in this appeal. The appellees now move to dismiss, because the matter in dispute does not exceed the sum of five thousand dollars. In support of this motion two grounds are relied on. They are:—

1. That the claims of the several complainants are separate and distinct, and cannot be united for the purpose of making up the amount necessary to give us jurisdiction. The effort in this connection is to bring the case within the operation of the principle under which motions to dismiss were granted in Seaver *v.* Bigelows, 5 Wall. 208; Rich *v.* Lambert, 12 How. 347; Oliver *v.* Alexander, 6 Pet. 143; Stratton *v.* Jarvis, 8 id. 4; and Paving Company *v.* Mulford, 100 U. S. 147.

2. That the matter in dispute is not the whole amount of the fund in court which is claimed by Davis, but only so much as would be distributable to the complainants under the assignment, if Davis is adjudged to be a partner and not a creditor. For this Terry *v.* Hatch, 93 U. S. 44, is relied on.

Without considering the first of these propositions, we

think it clear the case comes within the last. These appellants on this appeal represent no one but themselves. Their rights here are just what Omberg asked for himself, that is to say, such as belong to creditors who in this suit make good their claim to be paid under the assignment out of the fund proceeded against. The complainants do not necessarily represent all the creditors entitled to the benefits of the assignment, neither have they assumed anything of the kind. They ask only for such relief as belongs to those who actually come in according to their invitation. They are in no situation to appropriate to themselves the whole of the fund. The other creditors may certainly abandon their interest and permit it to go to Davis if they choose. The complainants cannot compel them to take it whether they want it or not. By not coming into the suit they, in effect, have elected not to contend with Davis for their share, and to treat him as a creditor rather than a partner. When Omberg went out of the suit all the creditors had come in who wanted him to proceed. Under these circumstances, if the bill had been sustained, no opportunity need have been given other creditors to come in. The court might very properly have said that, as they had stayed out until all risks of liability for costs and expenses were gone, they should not then be admitted. Such being the case, a decree would have been entered in favor of the complainants for their distributive shares of the fund, and no more. The rest would have remained for Davis, the same as though no suit had been begun. The fund is six thousand three hundred and fifty-four dollars and ninety-one cents, and the debts entitled to the benefit of the assignment seventeen thousand two hundred and thirty-three dollars and sixty-three cents, of which the complainants represent only nine thousand six hundred and seventy-two dollars and forty-three cents. Under this state of facts the whole of the distributive shares of the complainants, if they are successful,

will be less than five thousand dollars, not enough to give us jurisdiction. Upon an appeal we will not consider whether others may come in if we reverse the decree. We look only to the parties who are actually before us. The case is, therefore, within the rule stated in Terry *v.* Hatch, *supra*, and the motion to dismiss is *Granted.*

RUSSELL *v.* STANSELL, 105 U. S. 303.

AMOUNT—TAXES ASSESSED AGAINST INDIVIDUALS SEVERALLY.

Where the amount assessed against each individual is less than five thousand dollars, this court cannot take jurisdiction.

Motion to dismiss granted.

OPINION.—Stansell, the appellee, obtained a decree in the District Court of the United States for the Northern District of Mississippi, in June, 1879, against the Levee Board of Mississippi, District No. 1, for seventy-one thousand six hundred and twenty-three dollars and sixty-seven cents. This decree being unsatisfied, he instituted summary proceedings in the same court, under the provisions of the statute creating the levee board, to obtain an assessment and collection of the charge which was imposed on the lands in the district for its payment. On the 7th of February, 1880, the court entered an order which resulted in an assessment by commissioners appointed for that purpose. In this order it was provided that any person conceiving himself aggrieved by the action of the commissioners might, by petition to the court, present his grievance and obtain such redress as he should fairly be entitled to. On the 1st of February, 1881, D. M. Russell, W. H. Stovall, and H. P. Reid appeared, and, as individuals and members of an executive committee appointed at a mass meeting of the several owners of the lands charged with the payment of the assessment, asked an

injunction against the collection of the assessment that had been made, setting forth in their petition why the proceedings were illegal and unjust. The amount with which the petitioners, as individuals, were severally charged was as follows: Russell, seven dollars and fifty-eight cents; Stovall, two hundred and five dollars and fourteen cents, and Reid, who was assessed only as an agent or attorney, two hundred and twenty-nine dollars and twenty-nine cents. No single individual among all the parties represented by the committee could in any event be made liable for an amount exceeding two thousand five hundred dollars. On the presentation of the petition the court granted a preliminary injunction, but on final hearing that injunction was dissolved and the petition dismissed. From the last order this appeal was taken, which the appellee now moves to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment is less than five thousand dollars.

While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. The proceeding on his part was to require each of the several landowners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in Paving Company

v. Mulford, 100 U. S. 147; Seaver *v.* Bigelows, 5 Wall. 208; Rich *v.* Lambert, 12 How. 347; Stratton *v.* Jarvis, 8 Pet. 4, and Oliver *v.* Alexander, 6 id. 143, such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Although the amount due the appellee from the levee district exceeds five thousand dollars, his claim on the several owners of property is only for the sum assessed against them respectively. Any owner can relieve himself and his property from all further liability for the district by paying his part of the assessment. *Appeal dismissed.*

LAMAR *v.* MICOU, 104 U. S. 465.

AMOUNT.

Where the amount decreed against the appellant was less than five thousand dollars, the fact that he claims the rule of liability by which he was charged—which he insists was erroneous—would, if correct, charge him with more than five thousand dollars, will not give this court jurisdiction.

Motion to dismiss granted.

OPINION.—This is an appeal by the defendant below from a decree against him for less than five thousand dollars. There is no claim of set-off or counter-claim, except to reduce the amount of the recovery. In no event can he get any money decree in his favor. All he seeks to do is to defeat the claim of the appellee. Consequently the amount in controversy, so far as this appeal is concerned, is fixed by the decree. . . . In effect he insists that, under the rule of liability established against him in the court below, the decree should have been for more than five thousand dollars, and that for this reason he is entitled to an appeal, so that he may show he is not liable at all. This, we think it clear, is not the law.

The case is not changed by the fact that if, under an appeal

which is pending in another suit, it shall be found the appellant was credited in this suit with an amount which properly belonged to that, the decree in that suit will be reduced, while the one in this cannot be correspondingly increased. The appellee is satisfied with this decree, and has not appealed. The appellant cannot complain if it turns out in the end that, but for a mistake which was made in his favor, the appellee might have recovered a larger amount. *Appeal dismissed.*

THE "CONNEMARA," 103 U. S. 754.

AMOUNT—SALVAGE.

Where a decree awards to a set of salvors collectively a sum over five thousand dollars, in a suit to recover for a single salvage service on a single claim for the property saved, the amount is sufficient to give this court jurisdiction, in an appeal by the owner.

Motion to dismiss or to affirm denied.

OPINION.—The suit below was by a set of salvors to recover for a single salvage service, and there was but one claim filed for the property saved. The total amount of the recovery was fourteen thousand one hundred and ninety-eight dollars, but in the division among the several parties entitled to share in the recovery some got less than five thousand dollars. Separate and distinct interests were not united in the suit. The service rendered was the joint service of all the salvors, and the recovery was on that account. It was a matter of no consequence to the owners of the property saved how the money recovered was apportioned among those who had earned it. The owners were decreed to pay the salvors for what they, acting together in a common service, had done. In such a suit we think the owners cannot be deprived of their appeal because the court below, in the further progress of the cause, saw fit to apportion the re-

covery among the salvors according to their respective merits. The decree is, in legal effect, one decree in favor of all the salvors, they having, as between themselves, unequal interests.

In all the cases where we have held that several sums decreed in favor of or against different persons could not be united to give us jurisdiction on appeal, it will be found that the matters in dispute were entirely separate and distinct, and were joined in one suit for convenience and to save expense. Thus, in Seaver *v.* Bigelows, 5 Wall. 208, separate judgment creditors joined to set aside a fraudulent conveyance of their debtor, and the appeal was from a decree dismissing their bill; in Rich *v.* Lambert, 12 How. 347, several owners of a cargo, who had distinct interests, united in a libel against the ship to recover for damages done to the goods, and the appeal was from a decree in favor of each owner for his separate loss; in Oliver *v.* Alexander, 6 Pet. 143, the libel was by seamen to recover their wages, and the decree was in favor of each man separately for the amount due him individually; and in Stratton *v.* Jarvis, 8 id. 4, the decree was against each claimant of the goods saved by salvage service for his separate and distinct share of the salvage. The cases were heard, so far as the merits were concerned, precisely the same as if separate libels had been filed for each cause of action, and the decrees as entered were as in case of separate suits. Rich *v.* Lambert, *supra*. Here, however, the matter in controversy was the amount due the salvors collectively, and not the particular sum to which each was entitled when the amount due was distributed among them. As in Shields *v.* Thomas, 17 How. 3, "they all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions, . . . the dispute was among themselves."

The case, upon the merits, is one which we are not inclined to consider on a motion to affirm. *Motions denied.*

BANKING ASSOCIATION *v.* INSURANCE ASSOCIATION, 102 U. S. 121.

AMOUNT.

Where the record shows that the only dispute is as to the right of a company to withhold a transfer of stock until an indebtedness of a stockholder to it for two thousand and seventy-four dollars and thirty-six cents is paid, this court has not jurisdiction.

Motion to dismiss granted.

OPINION.—From this record it appears affirmatively that the only dispute between the parties is as to the right of the insurance association to withhold a transfer of stock until an indebtedness of a stockholder to it for two thousand and seventy-four dollars and thirty-six cents is paid. Such being the case, we have no jurisdiction of this appeal. In Gray *v.* Blanchard, 97 U. S. 564, we held that a writ of error must be dismissed when it appears from the record, taken as a whole, that the amount actually in controversy between the parties was not sufficient to give us jurisdiction.

Appeal dismissed.

NAGLE *v.* RUTLEDGE, 100 U. S. 675.

AMOUNT—COUNTER-CLAIM.

This court has jurisdiction of cases coming from the Supreme Court of Wyoming only when the value of the matter in dispute exceeds one thousand dollars.

Motion to dismiss granted.

OPINION.—To give us jurisdiction in cases coming from the Supreme Court of the Territory of Wyoming, the value

of the matter in dispute must exceed one thousand dollars. This writ of error was sued out by the defendant below on a judgment against him for only nine hundred and sixty-nine dollars and sixty-three cents. It is claimed we have jurisdiction, however, because the defendant in his answer set up a counter-claim for one thousand three hundred and forty dollars. The only question presented here on that branch of the case is whether the plaintiff below was liable for interest on a note of two hundred and ten dollars, at the rate of three per cent. a month from the 24th day of June, 1872, until the date of the judgment, July 26th, 1876, or for some shorter period. In no event could the amount thus put in controversy reach one thousand dollars; and since if error should be found in the charge of the court on this claim, it would only result in a reduction of the judgment as it now stands, and not in an actual money recovery in favor of the defendant below, it follows that our jurisdiction is not shown by the record, and that the suit must be dismissed.

So ordered.

PAVING COMPANY *v.* MULFORD, 100 U. S. 147.

AMOUNT—SEPARATE INTERESTS.

For the purposes of an appeal each separate controversy must be treated as a separate suit, and cannot be united to make the amount sufficient to give jurisdiction.

Motion to dismiss granted.

OPINION.—This was a suit in equity brought by the Ballard Paving Company against Michael Mandle and sundry persons who claimed to have purchased from him certain certificates of the Auditor of the Board of Public Works of the District of Columbia, which it was alleged were the property of the company. Mulford and Campbell, the appellees, were two of the defendants, but they were proceeded

against as holders of separate and distinct certificates. Their liability as set forth in the bill was several only. There was no pretense of a joint obligation, and it is conceded that in no event could there be a recovery against either of them separately for more than two thousand five hundred dollars. On the hearing the bill was dismissed as to these defendants, and the paving company has appealed.

We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into the suit, the proceeding is, in fact, against each of the several purchasers to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each as in case of separate suits. The recovery, if any, must be against each defendant separately for the amount [for which] he may personally be found accountable. Such being the case, the value of the matter in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. . . . In such cases the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction.

Appeal dismissed.

Railroad Company *v.* Trook, 100 U. S. 112.

Amount—Costs—Interest.

The value of the matter in dispute is determined by the judgment without adding interest or costs.

Motion to dismiss granted.

Opinion.—In cases brought here by writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed without adding interest or costs. The judgment in this case, after the one thousand five hundred dollars had been remitted to avoid a new trial, did not exceed two thousand five hundred dollars. Such being the case, under the rule established in Railroad Company *v.* Grant, 98 U. S. 398, our jurisdiction has been taken away.

The motion to dismiss will be granted, each party to pay his own costs; and it is *So ordered.*

Tintsman *v.* National Bank, 100 U. S. 6.

Amount.

Where the judgment below was for more than eight thousand dollars, but the record shows that the defendant admitted at the trial his liability for the claim, excepting three thousand one hundred and thirty-four dollars and twenty cents, the controversy in this court being for the latter amount only, this court has no jurisdiction.

Motion to dismiss granted.

Opinion.—In Gray *v.* Blanchard, 97 U. S. 564, we held that a case must be dismissed, if, on an examination of the whole record, it appeared that the value of the matter ac-

tually in dispute between the parties was less than our jurisdictional amount. This writ of error was brought by the defendant below to reverse a judgment against him of more than five thousand dollars; but, on looking into the record, we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant eight thousand two hundred and thirty-three dollars and seventy-nine cents, and interest from June 4, 1876. The defendant admitted that he owed of this amount five thousand and ninety-nine dollars and fifty-nine cents, for which the plaintiff was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or three thousand one hundred and thirty-four dollars and twenty cents. This, then, is the amount actually in dispute, and as it is less than five thousand dollars, we have no jurisdiction.

Writ dismissed.

RAILROAD COMPANY *v.* GRANT, 98 U. S. 398.

AMOUNT—REPEAL.

A case pending in this court at the time of the passage of an act of Congress repealing the law which gave jurisdiction, cannot be reviewed, unless such cases were excepted by a reservation in the repealing act.

Motion to dismiss granted.

OPINION.—The single question presented by this motion is whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case. Nearly seventy years ago, Mr. Chief Justice Marshall said, in Durusseau *v.* United States, 6 Cranch, 307, that this "court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of

those powers. Thus a writ of error lies to the judgment of a circuit court where the matter in controversy exceeds the value of two thousand dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value and implies negative words." There has been no departure from this rule, and it has universally been held that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by Congress.

It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. . . .

Section 847 of the Revised Statutes, relating to the District of Columbia, is in irreconcilable conflict with the Act of 1879. The one gives us jurisdiction when the amount in dispute is one thousand dollars or more; the other in effect says we shall not have jurisdiction unless the amount exceeds two thousand five hundred dollars. It is clear, therefore, that the repealing clause in the Act of 1879 covers this section of the Revised Statutes.

The Act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away pending proceedings in the appellate court, stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal,

and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit because our jurisdiction is gone.

It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the Act of 1875, 18 Stat. 316, raising the jurisdictional amount in cases brought here for review from the Circuit Courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874, id. 27, regulating appeals to this court from the Supreme Courts of the Territories, the phrase is, "that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed." Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. We think it will not be claimed that an appeal may now be taken or a writ of error sued out upon a decree or a judgment rendered before the Act of 1879 took effect if the matter in dispute is not more than two thousand five hundred dollars; but it seems to us there is just as much authority for bringing up new cases under the old law as for hearing old ones. There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun. If, as is contended, the object of Con-

gress was to raise our jurisdictional amount because of the increase of the judicial force in the district, we see no good reason why those who had commenced their proceedings for review of old judgments should be entitled to more consideration than those who had not. No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed.

Without more, we conclude that our jurisdiction in the class of cases of which this is one has been taken away, and the writ will accordingly be dismissed, each party to pay his own costs; and it is *So ordered.*

POTTS *et al v.* CHUMASERO *et al.*, 92 U. S. 358.

AMOUNT—MONEY VALUE.

Where the contest is not for money or any right, the value of which can be measured by money, this court has not jurisdiction.

Motion to dismiss granted.

OPINION.—We have no jurisdiction in this case. Writs of error and appeals lie to this court from the Supreme Court of the Territory of Montana only in cases where the value of the property or the amount in controversy exceeds the sum of one thousand dollars, and from decisions upon writs of *habeas corpus* involving the question of personal freedom.

In Barry *v.* Mercien, 5 How. 120, it was held, Chief Justice Taney speaking for the court, that, in order to give us jurisdiction in a case dependent upon the amount in controversy, "the matter in dispute must be money or some right,

the value of which in money can be calculated and ascertained." This rule has been followed in many cases. . . .

In the present case, the contest is not for money or any right, the value of which can be measured by money. The petitioners, to show that they have such a special interest in the question presented for adjudication as entitles them to commence and maintain the action, allege that they are attorneys and counselors at law, and that by the removal of the seat of government from Helena to Virginia City their expenses will be increased while in attendance upon the courts pursuant to their professional engagements.

But this is not the matter in controversy. The contest is as to the validity of certain proceedings for the removal of the seat of government for the Territory. The interest which the petitioners have in that contest is not in any sense property. Besides, they do not complain.

The defendants, who are the plaintiffs in error here, do not claim to be personally interested pecuniarily in the litigation. They only state in their answer that, if a removal is had, the United States will be put to an expense of three thousand dollars. But in this proceeding they do not represent the United States. They are government officials, but they do not appear here in their official capacity. By a law of the Territory, it has been made their duty to canvass the votes cast at a Territorial election. In this they act for the people of the Territory, and not for the United States. They derive all their authority for this purpose from a law of the Territory, and not from a law of Congress. If a judgment is given against them, they will not lose any money; neither will the petitioners gain any from them.

Writ dismissed for want of jurisdiction.

THE "D. R. MARTIN," 91 U. S. 365.

AMOUNT.

A judgment for five hundred dollars by a District Court, being reversed by the Circuit Court, cannot be reviewed in this court, the libelant having failed to appeal from the judgment of the District Court.

Motion to dismiss granted.

OPINION.—Barney, having failed to appeal from the decree of the District Court, is concluded by the amount found there in his favor. He appears upon the record as satisfied with what was done by that court. In the Circuit Court, the matter in controversy was the right to recover the sum which had been awarded him as damages. If that court had decided against the claimant, he could not have asked an increase of his damages. . . . As the matter in dispute here is that which was in dispute in the Circuit Court, it follows that the amount in controversy between the parties in the present state of the proceedings is not sufficient to give us jurisdiction. . . . *The appeal is dismissed.*

MASON *v.* GAMBLE, 21 H. 390.

AMOUNT—DUTIES OVERPAID.

In a suit against a collector to recover duties overpaid under protest by an importer, a writ of error by the collector to this court cannot be maintained under the act of Congress authorizing writs of error in revenue and customs cases where the United States brings suit.

Motion to dismiss granted.

OPINION.—A motion has been made to dismiss this case for want of jurisdiction, upon the ground that the sum in dispute does not exceed two thousand dollars. The case is this: The plaintiff in error is the collector of the port of Baltimore, and, as such, demanded a certain amount of duties

on goods imported by the defendants in error, which they believed was greater than the amount imposed by law. The duties demanded were paid under protest, and this suit was brought to recover back the amount alleged to be overpaid. At the trial the jury, under the instruction of the court, found a verdict in favor of the defendants in error for the sum of one hundred and ninety-three dollars and eighty-eight cents, upon which a judgment was entered against the collector, and this writ of error is brought on that judgment.

The act of Congress which is supposed to give jurisdiction in cases of this description is the Act of May 31st, 1844, 5 Stat. 658. This act authorizes a writ of error, at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy. And it is true that the same reasons which induced the legislature to give the writ of error in the cases mentioned in the law, apply with equal force to suits against a collector to recover back duties which he alleged to be due, and had already collected. The questions are of the same character, and the interests of the United States the same in either case. And it is most probable that suits against the collector were omitted in the act of Congress by some oversight or accident. But, however that may be, the writ of error is authorized in those cases only in which the United States are plaintiffs in the suit. The language of the law is too plain to admit of doubt, and the words cannot by any reasonable or fair construction be extended to suits brought by the importer against the collector; and as the sum or value in controversy does not exceed two thousand dollars, and the case is not provided for by the act of Congress referred to, the writ must be dismissed for want of jurisdiction in this court.

UDALL *v.* THE STEAMSHIP OHIO, ETC., 17 H. 17.

AMOUNT—AMENDMENT.

This court will not allow the libel to be amended here by the insertion of a claim of interest, so as to support the jurisdiction.

Motion to dismiss granted.

OPINION.—This is an appeal from the Circuit Court of the United States for the Southern District of New York, in admiralty.

The libel was filed in the District Court, which stated that in the years 1847 and 1848, the steamship Ohio then being in process of construction by Bishop & Simonson, the libelant furnished at the city of New York, for the building of said vessel, a large quantity of materials, timber, and tree-nails. That said articles, at a fair price, amounted in the whole to the sum of two thousand nine hundred and seventy-three dollars and fifty-seven cents, of which sum there is still due two thousand one hundred and fifty-nine dollars and twenty-eight cents, less tree-nails which, not having been used, were to be received back by the libelant, amounting to the sum of four hundred and sixty-eight dollars. That the balance of one thousand six hundred and ninety-one dollars and twenty-eight cents the owners, or those in charge of said vessel, have refused to pay, etc.

The appeal states the claim to be, at the time of the trial in the Circuit Court, interest included, two thousand one hundred and sixty-four dollars and eighty-six cents.

The libel was dismissed in the District Court and the case was appealed to the Circuit Court. In that court the decree of the District Court was affirmed, from which an appeal was taken to this court. A motion is now made to dismiss the appeal for want of jurisdiction.

It is stated by the counsel opposed to the motion that it

is the uniform practice in the Southern District of New York to establish on the hearing only the liability of the defendant and to have the amount of the damages ascertained on a reference to a commissioner, as the proofs in the record are not the full proof as to the amount of the damages.

It is not perceived how the practice in the Circuit Court can affect the question of jurisdiction. The decree of the District Court, which dismissed the libel, having been affirmed by the Circuit Court, we must look to the claim of the appellant in his libel, whether it exceeds the sum of two thousand dollars. The balance of the account claimed only amounts to the sum of one thousand six hundred and ninety-one dollars and eighty-six cents. But it is insisted that if the interest on this sum be computed up to the time of trial in the Circuit Court, the sum would exceed the amount required to give jurisdiction.

Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear, to give jurisdiction, on the face of the pleading on which the claim is made. No computation of interest will be made to give jurisdiction unless it be specially claimed in the libel. If not intended to be included in the claim of damages it should be specially stated. This would certainly be the case in an action at law, and no reason is perceived why the rule should be relaxed in a case of libel.

Under the 24th admiralty rule of this court, it is suggested the libel may be amended at any time, as of course, on application to the court. And if this be necessary the counsel now moves to amend the libel by inserting "together with the interest to the time of the final decree in this court, or any appellate court."

It has not been the practice of this court to allow amendments, except by the consent of parties; though in the case of Kennedy *et al. v.* Georgia State Bank, 8 How. 610, this court say "there is nothing in the nature of an appellate

jurisdiction, proceeding according to the common law, which forbids the granting of amendments," etc.; but the practice has been to remand the cause to the lower court for amendment.

If amendments be allowed so as to give jurisdiction to this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise and litigation would be encouraged. The plaintiff under such circumstances would never fail to sustain the jurisdiction of this court on his appeal.

On the ground that the matter in dispute does not appear on the face of the libel to exceed two thousand dollars, the appeal is *Dismissed.*

CLARK *v.* HANCOCK, 94 U. S. 493.

PRACTICE.

Motions to dismiss in advance of the return day of the writ of error will be entertained.

Motion to dismiss granted.

OPINION.—The final judgment in this case was rendered October 3d, 1876, and the writ of error issued November 16th, returnable to the October Term, 1877. The defendants in error having filed a copy of the record and docketed the cause, now move to dismiss for want of jurisdiction.

It is not claimed by the plaintiff in error that there is any Federal question disclosed by the record, but it is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice; but in *Ex parte* Russell, 13 Wall. 671, and Thomas *v.* Wooldridge, 23 id. 288, the rule was changed. It seemed to us then that such a change would "be likely to prevent great delays and expense, and further the ends of justice." Subsequent experience confirms that opinion. In the present crowded state of

our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely; and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind. In the present case we have a printed record, and it is evident we have no jurisdiction. *Motion granted.*

EAST TENNESSEE, ETC., R. R. CO. *v.* SOUTHERN TELEGRAPH COMPANY, 112 U. S. 306.

AMOUNT—SUPERSEDEAS MODIFIED ON MOTION.

The Circuit Courts of the United States, taking jurisdiction of a proceeding to enforce a remedy given by a State statute, can act only in accordance with the statute creating the remedy, and are possessed only of the powers conferred by it on the State courts; and this court will modify a *supersedeas* granted by a Circuit Court of the United States in such a proceeding, in order to make it conform to the powers conferred upon State courts in that respect.

On motion.

OPINION.—The value of the matter in dispute in this court is the difference between the amount of compensation claimed by the railroad company on its intervention and the amount assessed by the jury. Hilton *v.* Dickinson, 108 U. S. 165. There is nothing in the record to show that the alleged value of the property is not the true measure of the compensation to be assessed. As this amount is twelve thousand dollars, and the jury allowed only five hundred dollars, it follows that the value of the matter in dispute is sufficient to give us jurisdiction.

This is a proceeding under the statute of Alabama to ascertain the amount of compensation to be paid the railroad company for the appropriation of its property to the uses of the telegraph company. That is the single question to be settled.

The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act. It must be assumed for all the purposes of the proceeding that the telegraph company has the right to make the appropriation, and that as soon as just compensation is made it may enter on the property and put up and work its lines. It is a proper exercise of legislative power to provide a way in which the amount of compensation shall be ascertained where the parties are themselves unable to agree. In Alabama this is to be done by a jury impaneled in a Probate Court or in a Circuit Court. The legislature might have made the action in these courts final, and not subject to review on appeal or writ of error. If that had been done, the assessment of the jury, when recorded in the proper court, would settle finally the amount of compensation to be paid for the appropriation, unless the assessment should be set aside for fraud or other sufficient cause in some appropriate independent proceeding instituted for that purpose.

But it has been provided that an appeal may be taken "to correct errors of law only," the effect of which shall not be, however, to prevent the appropriating company from taking immediate possession and proceeding with its works on payment into court of the sum allowed by the jury. The courts of the United States, on the removal of the proceeding from the Probate Court, were clothed with no greater power in the premises than the courts of the State would have possessed if their jurisdiction had been preserved. It follows that, as an appeal from the Probate Court to the State Circuit Court, or to the Supreme Court, would not have operated to prevent the telegraph company from taking possession of the property appropriated and erecting its wires pending the appeal, the *supersedeas* on a writ of error from this court to the Circuit Court of the United States should be limited in the same way. This provision of the statute

is by no means an unusual one, and was intended to prevent delays in the progress of a public work while the parties were litigating in the higher courts as to the correctness of a preliminary assessment of compensation to be paid an owner of property taken for the public use according to the forms of law.

The motion to dismiss because the value of the matter in dispute does not exceed five thousand dollars is denied; but it is ordered that the *supersedeas* upon the writ of error from this court shall not, during the pendency of the writ, prevent or hinder the telegraph company from occupying the premises appropriated for its use, and proceeding to erect and operate its line of telegraph thereon, after it has paid into the Circuit Court, for the person or corporation entitled thereto, the amount of damages and compensation assessed by the jury impaneled in the Circuit Court.

GLENNY *v.* LANGDON, 94 U. S. 604.

PRACTICE.

Reinstated, a case improvidently dismissed will be.

Motion to reinstate granted.

OPINION.—The bill in this case shows upon its face that the suit was prosecuted by Glenny as a representative creditor, and that the other creditors named had the right to rely upon him for the protection of their interest until notice to the contrary. On Saturday, the 13th of January, Glenny, at Cincinnati, Ohio, entered into a stipulation with the defendants, consenting to a dismissal of the suit on their paying the costs. A copy of this stipulation was, on the same day with its execution, served at Cincinnati, on the counsel representing the complainant and those interested with him in the litigation, accompanied by a notice that a motion had

been filed to dismiss the appeal in accordance therewith; but no time was named for the hearing. On the same day, the counsel for the defendants forwarded the stipulation to the clerk, with the request that it be docketed in accordance with the practice of the court. In the letter transmitting the motion it was intimated that there might be opposition, and in that event a request was made for notice and information as to the practice in such cases.

On Tuesday, the 16th of January, the stipulation was presented to the court by Mr. Carpenter, at the request of the clerk made upon the authority of the letter transmitting it, and the suit was dismissed. On Monday, the 15th of January, the counsel for the complainant wrote the clerk from Cincinnati, asking him not to delay printing the record, on account of the motion, and intimating that the motion would not be sustained. A memorandum was made upon this letter by the clerk to the effect that he replied on the 20th of January, giving notice of the dismissal on the 16th. The letter of the clerk in reply did not reach the counsel, and he had no notice of what had been done until about the first of this month, and immediately thereafter the present motion was made.

Under the circumstances, we think the motion to dismiss was improvidently granted, and the order to that effect entered January 16th, is, therefore, set aside. The notice of the motion was insufficient and irregular, as it designated no time for the hearing. It is evident, also, that the counsel for the complainant supposed, as he properly might, that he was to have further information of the time when the motion would be called up. No other questions argued upon the present motion are decided, but the cause is reinstated, and the parties placed in the same condition they would be if the order of dismissal had not been entered.

Motion granted.

PACIFIC BANK *v.* MIXTER, 114 U. S. 463.

BOND—NAME OF PARTY.

Insolvent national banks are not required to give bond for the prosecution of suits in this court.

A mistake in a paper in a cause giving "Henry" instead of "George," as the name of the plaintiff, is not sufficient ground for a motion to dismiss.

Motion to dismiss denied.

OPINION.—Under § 1001 of the Revised Statutes, no bond for the prosecution of the suit, or to answer in damages or costs, is required on writs of error or appeals issuing from or brought to this court by direction of the comptroller of the currency in suits by or against insolvent national banks or the receivers thereof. This is such a case. There is abundant evidence in the record that the direction from the comptroller to the receiver was to take out a writ of error in this case, although, by mistake in one of the papers, Henry Mixter was named as the plaintiff instead of George Mixter. *Motion denied.*

DODGE *et al.* *v.* KNOWLES, 114 U. S. 436.

BOND, CITATION, AFFIDAVITS.

Allowance of an appeal at the term in which the decree was rendered constitutes a valid appeal from the Supreme Court of the District of Columbia, and docketing the cause in time perfects the jurisdiction of this court.

A bond is essential to the prosecution of an appeal; but leave to file one will be granted before granting a motion to dismiss.

Want of a citation is not necessarily sufficient ground for a motion to dismiss; other notice will suffice.

After a reversal of the judgment below, this court declines to receive affidavits to show that the value of the matter in dispute was not sufficient to give jurisdiction, the appellee having declined to appear at the hearing.

STATEMENT.—This cause was considered on its merits, the appellant only appearing. The court ordered a re-argument,

and notice thereof was given the appellee by order of the court. The appellee declined to appear. The court reversed the judgment below. Thereupon the appellee appeared by counsel for the purpose of moving to set aside the judgment of reversal and dismiss the appeal, first, for want of a citation; and, second, for want of amount sufficient to give jurisdiction.

On motion.

OPINION.—The facts on which this motion rests are these: The final decree in the cause was rendered February 23d, 1881. At the foot of the decree, and as part of the original entry, is the following:

"From this decree, the defendants pray an appeal to the Supreme Court of the United States, which appeal is hereby allowed.

"By order of the court. D. K. Cartter, Chief Justice."

Security upon the appeal was not taken until November 5th, 1881, which was after the term when the decree was rendered. No citation was served on the appellee, but the appeal was duly docketed in this court November 11th, 1881. The cause was called in its regular order for the first time January 9th, 1885, and on that day submitted on printed brief by the counsel for the appellants, no one appearing for the appellee. On the 17th of January, the court, of its own motion, ordered "that this cause be reargued, either orally or on printed briefs to be filed on or before the first Monday in March next." The purpose of this order was to allow the appellee an opportunity to be heard. A copy was served on him personally on or about January 21st, and he wrote the clerk, under date of February 28th, as follows: "Having been advised by counsel that no appeal has ever been perfected to the Supreme Court of the United States, in the case of which you write, I would inform you that I respectfully decline to authorize an appearance to be entered in that court for me in that cause for any purpose whatever."

On March 2d, the appellants again submitted the cause on a printed brief, no one appearing for the appellee. The case was taken under advisement and held until April 13th, when the decree of the court below was reversed, and an entry made to that effect. On the 20th of April the appellee came, and, entering an appearance only for the purposes of his motion, moved to set aside and annul the judgment of reversal and to dismiss the appeal, first, because no citation had been issued or served, and, second, because the value of the matter in dispute did not exceed two thousand five hundred dollars.

As to the last ground of the motion, it is sufficient to say that the decree appealed from was for more than two thousand five hundred dollars, and it charged the property of the appellants with the full amount. Upon the face of the record, therefore, our jurisdiction is complete. Such being the case, we are not willing to consider extrinsic evidence at this late day for the purpose of ascertaining whether the actual value of the property from which the collection must be made is sufficient to pay the whole debt or not.

The allowance of the appeal by the court, while in session and acting judicially, at the term in which the decree was rendered, constituted a valid appeal, of which the appellee was bound in law to take notice. The docketing of the cause in time perfected the jurisdiction of this court. The giving of the bond was not essential to the taking, though it was to the due prosecution of, the appeal. It was furnished and accepted in this case before the cause was docketed here. Had this not been done, we would have given the appellants leave to supply the omission before dismissing the appeal. All this was decided, on full consideration, in Peugh *v.* Davis, 110 U. S. 227. It has also been decided that if an appeal was allowed in open court during the term in which the decree was rendered, a citation was required as matter of procedure, if the security was not furnished until after the

term; but in Railroad Co. *v.* Blair, 100 U. S. 662, it was said: "Still an appeal, otherwise regular, would not probably be dismissed absolutely for want of a citation if it appeared, by clear and unmistakable evidence outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done." The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted. No special form is prescribed. The purpose is notice, so that the appellee may appear and be heard. The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper time, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of two years from the rendition of the decree or before. Here, before the cause came on for final hearing, notice was given the appellee by order of the court that the appeal taken in open court was being prosecuted, and that a reargument at an appointed time was desired. In response to this notice the appellee declined to appear, not because he had not been served with a citation, but because no appeal had been perfected. Had he complained of a want of citation, the omission might have been supplied, if, on consideration, it should have been deemed necessary. But the order which was served on him to appear and argue the cause, if he saw fit, was of itself the legal equivalent of a citation for all the purposes of this appeal. *The motions are denied.*

RICHARDS *v.* MACKALL, 113 U. S. 539.

APPEAL FROM SUPREME COURT DISTRICT OF COLUMBIA, BY WHOM ALLOWED—CITATION, BY WHOM SIGNED—SUPERSEDEAS BOND, FORM OF.

Any justice of the Supreme Court of the District of Columbia may sign a citation, and may, in a special term, allow an appeal from the General Term to the U. S. Supreme Court.

Motion to dismiss overruled.

OPINION.—The Supreme Court of the District of Columbia consists of one Chief Justice and five Associate Justices: Rev. Stat. Dist. Col., § 750; 20 Stat. 320, ch. 99, § 1. The law provides for both special and general terms of the court, and for an appeal from the special to the general term, but the judgments and decrees when rendered are, whether they be at a special or general term, the judgments and decrees of the Supreme Court: Rev. Stat. Dist. Col., §§ 753, 772. A general term is held by three justices, two, however, constituting a quorum, and a special term by one: Rev. Stat. Dist. Col., §§ 754–757; 20 Stat. 320, ch. 99, § 2. By § 705 of the Revised Statutes, as amended February 25th, 1879, 20 Stat. 320, ch. 99, § 4, the final judgments and decrees of the Supreme Court of the District of Columbia, in cases where the value of the matter in dispute exceeds two thousand five hundred dollars, may be brought to this court for review "upon writ of error or appeal in the same manner and under the same regulations as are provided by law in cases of writs of error on judgments or appeals from decrees rendered in a circuit court."

This is an appeal from a decree of the Supreme Court of the District at a general term held by Chief Justice Cartter and Associate Justices Hagner and Cox, which began on the first Monday in April, 1884, and ended July 5th, 1884.

The transcript contains the following:

"(Filed July 8th, 1884.)

"Supreme Court of the District of Columbia.

"Brooke Mackall, Jr., *v.* Alfred Richards *et al.* } 8,118 Eq.

"And now comes the said defendant, Alfred Richards, and appeals to the Supreme Court of the United States from the decree of the general term passed July 5th, 1884, in the above cause against him.

"WM. B. WEBB, for defendant Richards.

"The above appeal is allowed this 8th day of July, 1884.

"By the Court, MACARTHUR, Justice."

Then follows a citation in proper form signed by the Chief Justice of the court, bearing the same date as the order allowing the appeal. This citation was served October 7th, 1884.

Next in the transcript is the following:

"In the Supreme Court of the District of Columbia, the 10th day of July, 1884.

"Brooke Mackall, Jr., *v.* Alfred Richards *et al.* } No. 8,118 Eq. In error."

Then follows a *supersedeas* bond in due form, and at the foot these words:

"Approved July 11th, 1884. MACARTHUR, Justice."

The appeal was docketed in this court on the 15th of October, 1884.

The grounds of the motion may be stated thus:

1. The citation was not signed by the justice who approved the bond;

2. The citation was not served in time; and

3. Mrs. Richards and Leonard Mackall, who were defendants below, have not joined in the appeal.

Sections 999, 1012, and 705 of the Revised Statutes, taken together, provide in effect that when there is an appeal from the Supreme Court of the District of Columbia to this court, the citation may be signed by any justice of that court. Such an appeal is to be taken under the same regulations as appeals from the Circuit Court: Section 705. On appeals from the Circuit Court a judge of that court may sign the citation: Section 999. Clearly, therefore, when the appeal is from the Supreme Court of the District, a justice of that court may do the same thing.

The transcript in this case shows that the appeal was allowed by the court, undoubtedly sitting in special term. This, we think, may be done. An appeal in a proper case is a matter of right. The decree appealed from was the decree of the Supreme Court, and the court, while sitting in special term, was still the Supreme Court, and as such capable of allowing an appeal to this court from one of its final decrees, though rendered at general term. As the general term had closed, it was quite proper to apply to the court sitting in special term for the allowance of the appeal. The allowance by the court, while in session at special term, would not do away with the necessity of a citation, because the allowance would not have been made at the same term in which the decree was rendered: Yeaton *v.* Lenox, 7 Pet. 220; Railroad *v.* Blair, 100 U. S. 66. As the allowance was made by the court it was quite regular for the Chief Justice to sign the citation.

The transcript also shows that the bond was approved by the court. It seems to have been presented to the court on the 10th of July and approved the next day. What was done was, according to the transcript, "In the Supreme Court of the District of Columbia."

Even if the citation was not served in time, which we do not decide, the failure to serve will not work a dismissal of the appeal: Dayton *v.* Lash, 94 U. S. 112.

The last ground of the motion to dismiss was not relied upon in argument. The effect of what has been done was to allow a separate appeal by Alfred Richards.

The motions are overruled

DAKOTA COUNTY *v.* GLIDDEN, 113 U. S. 222.

AFFIDAVITS—COMPROMISE OF SUIT WHILE IN THIS COURT—EVIDENCE DEHORS THE RECORD ON MOTION TO DISMISS.

A valid compromise of a claim which includes the matter involved in a case brought to this court extinguishes the cause of action, and the writ of error will be dismissed.

This court will consider evidence *dehors* the record showing that it has no jurisdiction.

Motion to dismiss granted.

OPINION.—This case comes before us on a motion to dismiss the writ of error. The ground of this motion is that since the judgment was rendered which plaintiff in error now seeks to reverse, the matter in controversy has been the subject of compromise between the parties to the litigation, which is in full force and binding on plaintiff and defendant, and which leaves nothing of the controversy presented by the present record to be decided. The evidence of this compromise is not found in the record of the case in the Circuit Court, nor in any proceedings in that court, and it is argued against the motion to dismiss that it cannot, for that reason, be considered in this court. It consists of duly certified transcripts of proceedings of the Board of Commissioners of Dakota County, who are the authorized representatives of that county in all its financial matters, of receipts of the parties or their attorneys, and of affidavits of persons engaged in the transaction.

These are undisputed on the other side, either by contradictory testimony or by the brief of counsel who appear to

oppose this motion. They leave no doubt of the fact, if it is competent for this court to consider them, that shortly after the judgment against the county in favor of Glidden was rendered, the parties entered into negotiations to settle the controversy, which, after due deliberation and several formal meetings of the board of commissioners, resulted in such settlement.

The judgment in the case was rendered on certain coupons for interest due on bonds issued by said county to aid in constructing railroads. These bonds bore interest at the rate of ten per cent. per annum, and became due in the year 1896.

By the new agreement, the county took up the bonds and the coupons on which judgment was rendered, and issued new bonds, bearing six per cent. interest, the principal payable in the year 1902. These new bonds were delivered to plaintiff and accepted by him in satisfaction of his judgment and of his old bonds, and these latter were delivered by him to the county authorities and destroyed by burning. There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money And a defendant in an action of ejectment may bring a writ of error, and, failing to give a *supersedeas* bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other respect, its right to prosecute this writ of error would have remained uneffected. But what was done was a very different thing from that. A new agreement, on sufficient

consideration, was made, by which the judgment itself, the coupons on which it was recovered, and the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no *supersedeas* bond to secure its payment. It is a valid compromise and settlement of a much larger claim, but it includes this judgment necessarily. It *extinguishes* the cause of action in this case. If valid, it is a bar to any prosecution of the suit in the Circuit Court, though we should reverse this judgment on the record as it stands for errors which may be found in it. To examine these errors and reverse the judgment is a fruitless proceeding, because when the plaintiff has secured his object the relation of the parties is unchanged, and must stand or fall on the terms of the compromise.

It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction. But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceedings in a case before them on error or appeal.

The death of one of the parties after a writ of error or appeal requires a new proceeding to supply his place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced, as an agreement to submit the case on printed argument alone, within the time allowed by the rule of this court.

This court has dismissed several suits on grounds much more liable to the objection raised than the present case, as in the case of Cleveland *v.* Chamberlain, 1 Black, 419, where the plaintiff in error, having bought out the defendant's interest in the matter in controversy, and having control of both sides of the litigation in the suit, still sought for other purposes to have the case decided by this court. On evidence of this by affidavits, the court dismissed the writ. Similar cases in regard to suits establishing patent rights or holding them void by the inferior courts, as in Lord *v.* Veazie, 8 How. 251, 254; Wood Paper Co. *v.* Heft, 8 Wall. 333, 336, have been dismissed because the parties to the suit have settled the matter, so that there was no longer a real controversy; one or both of them was seeking a judgment of this court for improper purposes, in regard to a question which exists no longer between those parties.

It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that not found in the transcript of the original cause, because it occurred since that record was made up.

To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice.

The cases and precedents we have mentioned are sufficient to show that the proposition of plaintiff in error is untenable.

In the case of the Board of Liquidation *v.* Louisville & Nashville R. R. Co., 109 U. S. 221, a question arose on the presentation of an order made by the authorities of the City of New Orleans to dismiss a suit in this court in which that city was plaintiff in error. The order was based on a compromise between those authorities and the railroad company, which the board of liquidation intervening here alleged to be

without authority and fraudulent. The court here did not disregard the compromise or the order of the city to dismiss the case, but, considering that the question of authority in the mayor and council of the city to make the compromise, and of the alleged fraud in making it, required the power of a court of original jurisdiction to investigate and decide thereon, continued the case in this court until that was done in the proper court. But when this was ascertained in favor of the action of the mayor and council, the suit was dismissed here on the basis of that compromise order.

In the case before us we see no reason to impeach the transaction by which the new bonds were substituted for the old and for the judgment we are asked to reverse, and

The writ of error is dismissed.

CHEONG AH MOY *v.* UNITED STATES, 113 U. S. 216.

MOOT QUESTION.

Where, pending a question certified to this court as to whether a prisoner should be released on bail, an order of the court below that the prisoner be returned to China, has been executed, this court declines to take jurisdiction.

Motion to dismiss granted.

OPINION.—The plaintiff in error here is a Chinese woman who, arriving at San Francisco from China, was not permitted to land in that city, by reason of the acts of Congress of May 6th, 1882, and the amendatory act of 1884, and, being forcibly kept on board the vessel, sued out a writ of *habeas corpus* to obtain her release.

On a hearing in the Circuit Court of the United States, it was ordered that she be returned on board the vessel in which she came, or some other vessel of the same line, to be carried back to China; and she was placed in the custody of the marshal, who was directed to execute the order. On undertaking

to do this, it was found that the vessel had sailed, and the marshal placed his prisoner in jail for safe keeping until another vessel should be at hand to remove her.

Her counsel, upon this state of facts, applied to the Circuit Court for permission to give bail on behalf of the woman and have her released from custody. The judges of the Circuit Court were opposed in opinion on the question of granting this motion, and, having overruled it, have certified the division to this court. In the meantime it is made to appear to us, by the return of the marshal and by affidavits, that on the 2d day of October, three days after the order was made overruling the motion, and ten days before the writ of error herein was served by filing it in the clerk's office of the Circuit Court, the marshal had executed the original order of the court by placing the prisoner on board the steamship New York, one of the Pacific Mail steamships, about to start for China, and that she departed on said vessel on the 7th day of October. It thus appears that the order of deportation had been fully executed, and the petitioner in the writ of *habeas corpus* placed without the jurisdiction of the court and of the United States six days before the writ of error was filed in the Circuit Court and several days before it was issued.

The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail, it could be of no value to her, as the order by which she was remanded has been executed and she is no longer in the custody of the marshal or in prison. This court does not sit here to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce. *The writ of error is dismissed.*

POLLEYS *v.* BLACK RIVER IMPROVEMENT CO., 113 U. S. 81.

LIMITATIONS—PRACTICE.

The record and final judgment being in the Circuit Court of a county, the judgment having been entered pursuant to directions of the Supreme Court of the State, and the record being found only in the county court, the writ of error is properly directed to the county court.

The period of limitation prescribed by Congress for removing causes to appellate courts by writ of error begins from the day of entering judgment in the record book of the court's proceedings.

Motion to dismiss granted.

OPINION.—This is a writ of error to the Circuit Court of Wisconsin for the County of La Crosse, and a motion is made to dismiss it. The first ground of the motion is that the writ should have been directed to the Supreme Court of the State, and cannot be rightfully directed to the Circuit Court of the county. It appears that the defendant in error here was plaintiff in the Circuit Court of La Crosse County, and brought its action against Polleys and others for relief in regard to their obstructing the navigation of Black River and its branches.

The Circuit Court denied the relief and dismissed the bill. On appeal, the Supreme Court of the State reversed this judgment and delivered an opinion that plaintiff was entitled to relief in the premises, and it made an order remanding the case to the Circuit Court, with directions "to enter judgment in accordance with the opionion of this (that) court."

It appears by the cases cited to us, and by the course of proceedings in such cases in the Wisconsin courts, that the record itself is remitted to the inferior court, and does not, nor does a copy of it, remain in the Supreme Court. Though the judgment in the Circuit Court was the judgment which the Supreme Court ordered it to enter, and was in effect the judgment of the Supreme Court, it is the only final judg-

ment in the case, and the record of it can be found nowhere else but in the Circuit Court of La Crosse County.

To that court, therefore, according to many decisions of this court, the writ of error was properly directed to bring the record here for review. Gelston *v.* Hoyt, 3 Wheat. 246; Atherton *v.* Fowler, 91 U. S. 143, 146. It is insisted that the writ of error was not brought within time. Section 1008 of the Revised Statutes declares that "No judgment, decree, or order of a circuit or district court, in any civil action at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken within two years after the entry of such judgment, decree, or order."

This rule is applicable to writs of error to the State courts in like manner as to circuit courts. Scarborough *v.* Pargoud, 108 U. S. 567. In the case of Brooks *v.* Norris, 11 How. 204, construing the same language in the Judiciary Act of 1789, it is said "that the writ of error is not brought, in the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." This language is repeated in Mussina *v.* Cavazos, 6 Wall. 355, and in Scarborough *v.* Pargoud, *supra.*

Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, namely, the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office. This must be held to be the day on which the writ of error was brought. The judgment which we are asked to review by this writ was entered in the Circuit

Court of La Crosse County, May 24th, 1882. It is signed by the judge on that day, and is expressly dated as of that day, and it is marked filed on that day over the signature of the clerk of that court. This is the judgment—the entry of the judgment—and on that day the plaintiff in error had a right to his writ, and on that day the two years began to run within which his right existed.

It seems that the courts of Wisconsin, either by statute or by customary law, keep a book called a judgment docket. In this book are entered in columns the names of plaintiffs who recovered judgments, and the defendants against whom they are recovered. In another column is entered the amount of the principal judgment and the costs and the date of the judgment itself.

This record is kept for the convenience of parties who seek information as to liens on real estate or for other purposes. This docket, however, is made up necessarily after the main judgment is settled and entered in the order book or record of the court's proceedings, and it may be many days before this abstract of the judgment is made in the judgment docket, according to the convenience of the clerk.

It is the record of the judicial decision or order of the court found in the record book of the court's proceedings which constitutes the evidence of the judgment, and from the date of its entry in that book the Statute of Limitation begins to run.

It follows that the writ of error in this case was brought five days after the two years allowed by law had expired, and it must be *Dismissed.*

LEGGETT *v.* ALLEN, ASSIGNEE, 110 U. S. 741.

BANKRUPTCY.

A proceeding to prove a debt in a suit in bankruptcy is part of the suit, and not an independent proceeding; and this court has no jurisdiction to review a judgment of the Circuit Court on appeal from an order of the District Court rejecting a claim.

Motion to dismiss granted.

OPINION.—This motion is granted on the authority of Wiswall *v.* Campbell, 93 U. S. 347, in which it was decided that this court has no jurisdiction to review a judgment of the Circuit Court, rendered in a proceeding upon an appeal from an order of the District Court rejecting the claim of a supposed creditor against the estate of the bankrupt, and for the reason that a proceeding to prove a debt is part of the suit in bankruptcy, and not an independent suit at law or in equity. Such being the nature of the proceeding, it is a matter of no consequence whether the appeal from the District Court to the Circuit Court was taken by the creditor or the assignee, for it has always been held that this court has no control over judgments or orders made by the Circuit Courts in mere bankruptcy proceedings. It is unnecessary to repeat here what was said in Wiswall *v.* Campbell. This case and that are in all material respects alike.

Dismissed.

UNITED STATES *v.* GRANT, 110 U. S. 225.

CORRECTION OF ERROR IN A DECREE.

Where a judgment was rendered for a sum certain, and subsequently the court found from the same evidence that the amount should have been larger, and amended its judgment accordingly, an appeal from this judgment is dismissed.

Motion to dismiss granted.

OPINION.—Grant & Co. sued the United States in the Court of Claims on the 2d of December, 1868, and on the 6th of December, 1869, recovered a judgment for thirty-four thousand two hundred and twenty-five dollars and fourteen cents. On the 5th of January, 1883, the following act was passed by Congress:

"Be it enacted . . . That the Court of Claims be, and it is hereby, directed to reopen and readjudicate the case of Albert Grant and Darius Jackson . . . upon the evidence heretofore submitted to the said court in said cause, . . . and if said court in such readjudication shall find from such evidence that the court gave judgment for a different sum than the evidence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and sixteen dollars and twenty-nine cents; and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the fifth Court of Claims report, page eighty."

Under this act Grant, on the 13th of January, 1883, applied to the court to re-examine the case and to render a judgment *nunc pro tunc* for the additional sum of fourteen thousand and sixteen dollars and twenty-nine cents. Upon this application the court, on due consideration, found that the original judgment was given for a different sum than was intended, and that, "in order to correct such error and adjudge to said Albert Grant such additional sum in this cause as the evidence justifies, he should receive a further sum of fourteen thousand and sixteen dollars and twenty-nine cents," and on the 11th of June, 1883, a judgment for that amount was rendered. From this judgment the United States took an appeal, which Grant now moves to dismiss on the ground that no appeal lies from an order or judgment entered in such a proceeding.

In our opinion this motion should be granted. The act of Congress, in its legal effect, is nothing more than a direction to the Court of Claims to entertain an application to correct an error in the entry of one of its former judgments. The readjudication ordered is to be upon the old evidence, and if an error is found, the correction is to be made, not by rendering a new judgment, but by amending the old one. The language is "and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment." As, when the act was passed, an appeal from the original judgment was barred by lapse of time, we are satisfied it was the intention of Congress to make the action of the Court of Claims upon this readjudication final. Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate that the new part of the judgment can be separated from the old for the purposes of review here. By the correction the new judgment was merged in the old. *The motion to dismiss is granted.*

HECHT *v.* BOUGHTON, 105 U. S. 235.

APPEAL—PRACTICE—WRIT OF ERROR.

This court can review cases from Wyoming Territory not tried by jury only when brought up by appeal. A writ of error will be dismissed.

Motion to dismiss granted.

OPINION.—This is a writ of error to the Supreme Court of the Territory of Wyoming, to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss, because the case should have been brought here by appeal, and not by writ of error.

The second section of the Act of April 7th, 1874, c. 80, 18 Stat., pt. 3, p. 27, is as follows:

"That the appellate jurisdiction of the Supreme Court of

the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

"Provided, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court heretofore taken upon any such judgment or decree shall be invalidated by reason of being instituted by writ of error or appeal:

"And provided further, that the appellate court may make any order in any case heretofore appealed which may be necessary to save the rights of parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed."

This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the Territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. . . . We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal to the statement of facts and rulings

certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances the form of proceeding to get a review is not of so much importance as certainty about what is to be done.

We cannot agree with counsel for the plaintiff in error that the act of Congress was intended to apply only to those Territories where the distinction between suits at law and suits in equity had actually been abolished. From the preamble it may fairly be inferred that the object of the legislation was to prevent embarrassments growing out of the mingling of jurisdictions, but the statute as it stands clearly applies to all Territorial courts. *Motion granted.*

CUMMINGS *v.* JONES, 104 U. S. 419.

LIMITATIONS.

Section 1003 Revised Statutes applies alike to writs of error to State and Federal courts. A writ not brought within two years after the judgment complained of is dismissed.

Motion to dismiss granted.

OPINION.—This is a writ of error to the Supreme Court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by § 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of error to State courts. We have no hesitation in saying it does. Section 1003 provides that "writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

This is almost the exact language of a similar provision in the twenty-fifth section of the Judiciary Act of 1789, and we are not aware it was ever supposed that writs issued to the State court under that section were not subject to the limitation prescribed for writs to the Circuit Courts by the twenty-second section. In Brooks *v.* Norris, 11 How. 204, this seems to have been assumed, and a writ to a State court was dismissed "on the ground that it is barred by the limitation of time prescribed by the act of Congress." There was at that time no other limitation than the one contained in the twenty-second section.

Inasmuch as the writ was not brought within two years after the judgment complained of was rendered, the motion is *Granted.*

HUMPHREY *v.* BAKER, 103 U. S. 736

CONTEMPT OF COURT.

An order of commitment for contempt of court in refusing to obey a decree entered below in accordance with the directions of this court will not be reviewed here on appeal.

Motion to dismiss granted.

OPINION.—At the last term, on a former appeal in this case, Baker *v.* Humphrey, 101 U. S. 494, we decided "that the complainant, Baker, deposit in the clerk's office for the use of the defendant, George P. Humphrey, the sum of twenty-five dollars, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts, and the demands of all other persons claiming under him." A mandate was thereupon issued to the Circuit Court to enter a decree in accordance with this decision, and carry it into effect. Pursuant to this mandate a decree was entered, of which no complaint is made. The money was deposited with

the clerk at or before the time of the decree, and immediately thereafter a deed in all respects appropriate in form was prepared and presented to Humphrey for execution. This he neglected to do, and he was ordered to show cause why he should not be attached for contempt on that account. In obedience to this order he appeared and for cause showed:

"1st. That before said decree was entered the Circuit Court gave him leave to file, and he did file, a bill of supplement and review to obtain reimbursement for taxes and improvements paid and made upon the premises in question.

"2d. That said bill was duly filed before said decree was entered, and the complainant, who is the defendant therein, has appeared and demurred thereto, and the same is now pending and undetermined.

"3d. That this defendant has been advised and verily believes that no process would issue against him to compel him to sign the deed in question, until the questions presented by his said bill were disposed of."

Upon the hearing Humphrey was adjudged to be in contempt, and it was decreed that he stand committed to the Detroit House of Correction until he executed the deed, unless sooner discharged by the court.

From this order of commitment the present appeal has been taken, which the appellee now moves to dismiss.

In Stewart *v.* Salamon, 97 U. S. 361, we decided that we would not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, and that when such an appeal was taken we would on application examine the decree, and if it conformed to the mandate, dismiss the case with costs. If it did not, we would remand the case with appropriate directions for the correction of the errors. The decree entered below, in the present case, followed the mandate in every particular, and was in legal effect ours. It commanded Humphrey to convey, and the proceedings in which the order now appealed from was entered were

for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the Circuit Court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions, and may with propriety be considered part of our decree. It was the appropriate way of getting the conveyance which we said must be made. If in the end it shall appear that Humphrey is entitled to the relief he asks, in what he denominates his "bill of supplement and review," the appropriate decree to that end will be made in that proceeding. The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution. Under the rule established in Stewart *v.* Salamon, therefore, the appeal is

Dismissed with costs.

HENTIG *v.* PAGE, 102 U. S. 219.

INTERLOCUTORY ORDER.

An order refusing to restrain a marshal from executing a writ of assistance issued to put a receiver in possession will not be reviewed in this court on appeal.

Motion to dismiss granted.

OPINION.—On the 26th day of October, 1877, Mary A. Smith, administratrix *de bonis non* of Julia C. Wright, filed her bill in the Circuit Court for the District of Kansas against Daniel M. Adams and others, to foreclose a mortgage made by Adams and wife on certain lands in Shawnee County, Kansas. On the 3d of September, 1878, the lands covered by the mortgage were sold by the treasurer of the county to the appellant for sixty-four dollars and ninety-two cents, being the full amount of tax, penalty, and charges due on

them for the year 1877. At the time of the sale there was delivered to the purchaser a certificate, which set forth the sale and stated that she would be entitled to a deed for the lands on the 4th of September, 1881, unless they should be redeemed prior to that time, in accordance with the provisions of law. On the 8th of February, 1879, Hentig, the purchaser, leased the premises to C. E. and W. K. Gillan for one year from the 1st of March, 1879, at a rent of two hundred dollars, and put them in possession. The certificate of tax sale was recorded November 18th, 1878, and the taxes of 1879, amounting to sixty-seven dollars and eighty cents, were paid by Hentig, March 10th, 1879.

On the 4th of June, 1879, the court having become satisfied that the property was an inadequate security for the mortgage debt, and that Adams, the debtor, was insolvent, appointed H. J. Page receiver of the rents and profits of the property, and ordered that "all persons in possession of such premises, whether parties to this cause, tenants under any of them, or persons who have come into possession pending these proceedings," yield up possession to the receiver on demand. On the 10th of July the receiver reported to the court that he found the Gillans in possession, who refused to surrender, claiming that they held under a lease from Hentig, and had paid one hundred and fifty dollars of their rent, and that the remainder, being only fifty dollars, was not due. The court thereupon issued to the marshal a writ of assistance, directing him to eject from the premises the persons described in the original order appointing the receiver, and to put the latter in possession. On the 12th of July, an order in the suit was entered in the order book, directing the complainant and receiver to show cause before the district judge at his chambers, on the 18th, why the writ of assistance should not be revoked, and directing that in the meantime nothing be done under the writ. At the time named the appellant was permitted to file in the suit what was de-

nominated a substituted petition. This petition was addressed to the "Hon. C. G. Foster, one of the judges of the court," and set forth the claim of the appellant under the tax title with the lease to the Gillans, and concluded as follows: "Wherefore your petitioners pray that the said marshal may be enjoined from further proceeding in the execution of such writ, and that upon the hearing said writ may be revoked by an order of this court, and that your petitioner may have such other and further relief as to equity may seem meet. And as in duty bound will ever pray," etc. This petition was thereupon heard, and an order entered in the order book as follows:

"Mary A. Smith, Adm'r'x, etc., Comp't,
v.
Daniel M. Adams *et al.*, Def'ts. } 2055

At Chambers, July 18th, 1879.

"Now comes the complainant and receiver, H. J. Page, by G. C. Clemens, their solicitors, and A. J. Hentig, by Hentig & Sperry, her solicitors, and thereupon came on to be heard the matter of the petition of A. J. Hentig to enjoin the marshal from further proceeding in the execution of the writ of assistance issued herein to put said receiver into possession of the property described in the bill of complaint and decree herein, and to revoke said writ, and was argued by counsel; on consideration whereof it is now here ordered that said petition be and is overruled and denied.

"From this order and ruling said A. J. Hentig prays an appeal to the Supreme Court of the United States, which is allowed, and the bond in appeal fixed at three hundred dollars, to act as a *supersedeas*."

On the 22d of July the required bond was given and the appeal perfected. The case has been submitted under the twentieth rule, but the submission was accompanied by a motion of the appellee to dismiss for want of jurisdiction.

We think the motion to dismiss must be granted. The order appealed from is not a final decreé "in a case of equity." The petition on which the order was made was in reality nothing more than a motion in the original suit by the appellant, with leave of the court, for a recall of the writ of assistance. It certainly is not a bill in equity, for it names no parties defendant and prays no process. It is addressed to one of the judges of the court, and not to the judges or to the court; and the appellees were brought in on a rule to show cause in the pending suit, and not by an original writ. Although the judge in rendering his decision gave as a reason for refusing to grant the petition that the tax certificate alone, before the expiration of the time of redemption, vested no title in the purchaser, the order as made settled no such question. The effect of what was done was simply to leave the writ of assistance in force. The rights of the parties were not changed in any particular. The appellant was still no party to the suit, and she could resist the writ as well after the order as before. She did not by her petition submit herself to the jurisdiction of the court in the cause. Her application was in the nature of a suggestion to the court that the writ had been improvidently issued, and therefore should be withdrawn. She has still all the legal and equitable remedies to enforce her original rights that she ever had. If the writ would not justify the marshal in putting her tenants out of possession when it was issued, it will not now. If she could by a suit in equity enjoin the execution of the writ against her tenants before her motion was made, she could afterward.

It follows that the appeal must be dismissed; and it is

So ordered.

SEWARD *v.* CORNEAU, 102 U. S. 161.

BOND.

An informal bond, insufficient as a *supersedeas*, or an appeal bond, will not necessarily avoid an appeal.

Motion to dismiss granted—*nisi*.

OPINION.—The bond in this case is insufficient in form either for the purposes of a *supersedeas* or an appeal, inasmuch as it contains no security for costs. This, however, does not necessarily avoid the appeal; but we may impose such terms on the appellants for the omission as, under the circumstances, shall seem to be proper. . . . The appeal will, therefore, be dismissed, unless the appellants, on or before the first Monday in January next, give bond, with good and sufficient security, in due form of law, to prosecute their appeal to effect, and to answer all damages and costs if they fail to make their plea good; the bond to be in the penal sum of one thousand dollars, and the security taken and approved by the justice of this court assigned to the fifth circuit, and it is *So ordered.*

HAYES *v.* FISCHER, 102 U. S. 121.

APPEAL—CONTEMPT—WRIT OF ERROR.

An independent proceeding for contempt cannot be re-examined in this court, and alleged errors in imposing punishment for contempt in an equity cause can be examined here on appeal only, and then only after a final decree.

Motion to dismiss granted.

OPINION.—Fischer, the defendant in error, brought a suit in equity in the Circuit Court of the United States for the Southern District of New York to restrain Hayes, the plaintiff in error, from using a certain patented device. In this

suit an interlocutory injunction was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk one thousand three hundred and eighty-nine dollars and ninety-nine cents as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the Circuit Court cannot be re-examined here.

If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte* Kearney, 7 Wheat. 38, and the rule then established was followed as late as New Orleans *v.* Steamship Company, 20 Wall. 387.

It follows that we have no jurisdiction.

Motion granted.

RAILROAD COMPANY *v.* BLAIR, 100 U. S. 661.

CITATION—NOTICE OF APPEAL.

Allowance of an appeal in open court in presence of appellees' counsel, at a term subsequent to the rendition of the decree, the case being duly docketed in this court, will justify appellants in inferring that a citation would be waived.

Appellants allowed, under such circumstances, to serve a citation.

Motion to dismiss granted—*nisi.*

OPINION.—The decree appealed from in this case was ren-

dered February 12th, 1879, during the December Term, 1878, of the Circuit Court. The appeal was not allowed until April 14th, 1879, which was during the March Term, 1879. The practice only dispenses with a citation when the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered; and, to be technically sufficient, so as to render a citation unnecessary, the taking of the appeal should in some form appear on the records of the court. The theory of the rule is, that as a party to a suit is constructively present in court during the entire term at which his cause is for hearing, and as the doings of the court are matter of record at the time, he is chargeable with notice of all that is done during the term affecting his suit, because, if actually absent when an order is made, he can on his return obtain full information by an examination of the minutes. Still, an appeal otherwise regular would not probably be dismissed absolutely for want of a citation, if it appeared by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done.

The records of the court in this case show an allowance of the appeal in court when the appellees were present by their solicitors. It was, however, at a term subsequent to the rendition of the decree, and under the practice a citation was necessary to bring the appellees to this court. The case was docketed promptly here at the term to which the appeal was returnable, and as the appellants might well have supposed that a citation would be waived, we will not dismiss the appeal absolutely, but apply the rule acted on in Dayton *v.* Lash, 94 U. S. 112, and "grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper."

An order may be entered that unless the appellants cause a citation, returnable on the first Monday of February next,

to be issued and served upon the appellees before that date, the appeal be dismissed. *So ordered.*

RAILROAD COMPANY *v.* SCHUTTE, 100 U. S. 644.

BOND—TRANSCRIPT.

A *supersedeas* will be vacated when it was fraudulently procured.
The transcript being incomplete, leave is granted to supply omissions.

On motion.

OPINION.—In this case the appellees have moved:

1. To vacate the *supersedeas*, because the approval of the *supersedeas* bond by the justice of this court, who allowed the appeal, was obtained by fraud and perjury; and,

2. To dismiss the appeal, because the transcript of the record which has been filed in this court is not complete and is not properly certified.

The appellants also have moved for leave to file a new bond in case the old one shall be set aside.

1. As to the vacation of the *supersedeas*.

That the approval of the bond was brought about by gross fraud and perjury is so conclusively shown that no attempt has been made to deny it. The evidence also shows with equal certainty that the bond was obtained in the most irregular way.

A lawyer who, to say the least, was an entire stranger to all the parties in interest, was employed to procure, within thirty-six or forty-eight hours, sureties for the appellants sufficient to secure the payment of one hundred thousand dollars. He was to be paid for his services six bonds of one thousand dollars each of the Florida Central Railroad Company, the appellant corporation, which were then of no marketable value. In due time he produced the requisite number of persons to sign as sureties. When they came the "usual

form of justification of about four lines in length" was "ignored," and a full affidavit was drawn for each surety, wherein was set forth "the name and residence of the surety, the amount of real estate, its location, its value, whether or not incumbered, if so, to what amount; next, the amount of his personal property, its character, whether or not incumbered, and if so, to what amount; next, whether or not the surety was upon any other bond; next, whether or not there were any judgments against the surety; and finally summing up that he owned so much over all his debts and liabilities, naming the sum. Each of these questions each surety answered favorably, and swore to. The justifications were extraordinary in their minuteness, as the affidavits will show."

This being done, a bond sufficient in form was signed by the "procured" sureties. One of the persons who signed, said to be a "very wealthy man," was paid one hundred and twenty-five dollars for what he did. Another, "the son of a former judge of the Supreme Court of the State of New York," received twelve dollars and fifty cents; another, a colored porter in a lawyer's office, ten dollars; another was paid ten dollars; and another was promised fifty dollars, but actually paid nothing. They were all irresponsible pecuniarily, and known to or suspected by the police of the city of New York, as "purchasable sureties." The money to pay them for their fraudulent work was furnished by an agent of the appellant company under the form of buying back one of the worthless bonds promised as a reward for what was done.

After the bond was executed by the sureties thus obtained, the president of the appellant corporation was called in. He signed officially the name of the corporation, and affixed the corporate seal, but did not see, or ask to see, any of the persons who had become bound with his company. Neither he nor any other person actually interested in the litigation became in any manner personally bound.

With such a bond, procured in such a way, the president of the corporation presented himself at the last moment to the justice of this court, who heard the cause in the Circuit Court at his summer residence in Vermont, and asked that the bond be approved. On its presentation, as we are informed by the testimony of the president himself, the justice read and seemed to be impressed "with the fullness and particularity of the justifications." He said, "This seems to be a good bond." The reply was, "Yes, Judge, I believe it to be a very good bond." The justice then asked as to one of the parties whose name appeared, and the reply was, "I am informed that he is the son of a former judge of the Supreme Court of the State of New York of that name," adding that another of the signers, "I am advised, is a very wealthy man."

Under these circumstances, the bond was approved. To allow it to stand and to operate as a stay of execution upon an important decree until the case can be reached in its order on our crowded docket would be a reproach upon the administration of justice. We are aware that in Jerome *v.* McCarter, 21 Wall. 17, we said, "that, upon facts existing at the time the security was accepted, the action of the justice, within the statute and within the rules of practice adopted for his guidance, is final," and that we would "presume that when he acted, every fact was presented to him that could have been." We are not inclined to depart from that rule, but, in a case of this kind, fraud is always open to inquiry. When discovered, justice requires that summary relief should be afforded, whenever and wherever it may be done consistently with the forms of orderly judicial procedure. This bond is as much false as if it had been forged. The persons who signed it are not, in fact, what they were represented to be. We have no hesitation in setting aside the approval of the bond.

2. As to the acceptance of a new bond in the place of the old one.

This application is addressed to our judicial discretion, and is based on the alleged ignorance of the officers and agents of the appellant corporation as to the character of the bond they got accepted. They insist in the most positive manner that they were deceived, and that they actually believed the security they offered was ample. The character of the president is vouched for under oath by many persons occupying high positions in public and private life, and they all say "they do not believe he would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States, or any justice thereof, a fraudulent or worthless bond;" but the fact still remains that he did present such a bond, and if he was ignorant of the wrong that was being done, the other agents of the company were not. Taking the whole case together, we think it quite as incumbent on us to refuse to accept a new bond as it is to set aside the old one.

The motion to vacate the *supersedeas* is granted.

3. As to dismissing the appeal.

The evidence shows that after the bond was accepted the president of the railroad company went with his own copyists to the office of the clerk of the Circuit Court, and in the absence of the principal clerk selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript. This being done, he caused a certificate to be added, signed in the name of the clerk by a deputy, and sealed with the seal of the court, to the effect that the transcript annexed contained copies of such entries, papers, and proofs as were "necessary on the hearing of the appeal prayed and allowed in the said cause." It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed.

While we desire to encourage in every proper way all at-

empts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court. We therefore order,—

That the appellees file with the clerk of this court, and with the counsel for the appellant, on or before the 1st day of February next, a statement of the papers, documents, and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause, and that unless the appellant shall, on or before the 15th day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the Circuit Court or his deputy, under the seal of the court, this appeal be dismissed.

If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper.

GRIGSBY *v.* PURCELL, 99 U. S. 505.

PRACTICE.

Where, by reason of the negligence of the appellant, the transcript is not filed at the term of this court to which the appeal is taken, the court may dismiss the appeal of its own motion, or will do so upon motion of a party.

Motion to dismiss granted.

OPINION.—This was a suit to enforce the provisions of a trust deed executed by J. Warren Grigsby to secure "all the debts of the house of Taylor, Shelby & Co., created since the 14th day of July, 1857," for which he was liable. The bill was filed by part of the creditors for themselves and such others as should come in and prove their claims. In the

progress of the cause a reference was had to a master, who in due time made his report. At the hearing before the master, the appellant, Susan P. Grigsby, the wife of J. Warren Grigsby, appeared as a creditor and proved her claim. To the report of the master she excepted; and upon the hearing the court decreed in her favor to the amount of twenty-one thousand seven hundred and fifty-three dollars and five cents, and directed the payment of that amount to her from the fund in court. The remainder of her claim was rejected. This decree was rendered at the February Term, 1875, of the Circuit Court, and on the 15th day of the month of February. On the 23d of the same month, and during the term, an entry was made in the cause granting an appeal prayed by J. Warren Grigsby and Susan P. Grigsby, but it does not appear that any bond for costs or for a *supersedeas* was ever executed.

On the 19th of April, 1875, Mrs. Grigsby receipted to the receiver in the cause for the amount of the decree in her favor, and on the 6th of May, still during the February Term, an appeal prayed by W. H. Thomas was granted, but, so far as appears, no bond executed.

The October Term, 1875, of this court closed by adjournment on the 8th of May, 1876. Neither of these appeals were docketed during that term, and the transcript of the record was not filed in court. So far as appears, no attempt was made to do so, and no excuse has been given for the delay; but on the 12th of August, 1876, before the commencement of the next term, the transcript was filed by Mr. and Mrs. Grigsby, and their appeal docketed. That of Thomas was not docketed until during the present term. Nothing further was done in the case by either party until December 14th, 1878, when the appellees moved to dismiss the appeal of Grigsby and wife because it was a joint appeal, the appellants not being united but opposed in interest. Printed briefs for and against this motion were filed by the

respective parties, and on the 23d of December the motion was overruled. The attention of the court was not called to the delay in filing the transcript and docketing the appeals until January 19th, 1879, when the causes were reached in their regular order on the docket. The counsel for the appellees then suggested the delay, and moved to dismiss on that account.

Section 997 of the Revised Statutes, which is a substantial re-enactment of a similar provision in section 22 of the Judiciary Act of 1789 (1 Stat. 84), requires that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." Appeals are subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error. . . .

Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed. . . .

After the cases of Hamilton *v.* Moore, 3 Dall. 371, and Blair *v.* Miller, 4 Dall. 21, an attempt seems to have been made in Wood *v.* Lide, 4 Cranch, 180, to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in Edmonson *v.* Bloomshire, 7 Wall. 355, we considered the practice so well established as to make it better "to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century." There are, however, exceptions to the rule, as in United States *v.* Gomez, 3 Wall. 752, where there was fraud, and in United States *v.* Booth, 21 How. 506, where the State court to which the writ was directed

ordered the clerk to disregard the writ and make no return; but in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence.

These appellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done toward the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances would be to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them.

It by no means follows, as seems to be supposed by counsel who resist this motion, that if parties appear and without objection go to a hearing in a cause docketed after the return term, our judgment will be void for want of jurisdiction. The real objection is not that this court has no jurisdiction, but that the plaintiff in error or the appellant, as the case may be, has failed to duly prosecute his suit, and this objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time.

Appeal dismissed.

VANSANT *v.* GAS-LIGHT COMPANY, 99 U. S. 213.

BOND—CITATION.

An appeal bond, approved by the Chief Justice and filed during the term, will not dispense with a citation where the appeal was not taken in open court during the term.

Motion to dismiss granted.

OPINION.—No citation has been issued in this cause. A citation only becomes unnecessary when the appeal is allowed in open court during the term at which the decree is rendered. This implies some action of the court while in open session, and to be regular should be entered on the minutes. Here, although an appeal bond was approved by the Chief Justice of the court and filed with the clerk during the term, it does not appear to have been done while the court was actually in session. So far as the record shows, it was the act of the Chief Justice alone out of court. The entry on the order book is simply a direction to the clerk, by the solicitor of the appellant, to enter an appeal. It in no way indicates any action whatever either in or by the court.

Appeal dismissed.

STEWART *v.* SALAMON, 97 U. S. 361.

APPEAL—PRACTICE.

An appeal will not be entertained from a decree entered in an inferior court in exact accordance with a mandate of this court, but will be dismissed on motion.

Motion to dismiss granted.

OPINION.—An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous ap-

peal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error. This is not intended to interfere with any remedy the parties may have by *mandamus*.

This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions and carry it into effect. If, in the progress of the execution of the decree after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate.

The appeal will be dismissed with costs, and it is

So ordered.

Mr. Justice CLIFFORD dissenting.

O'REILLY *v.* EDRINGTON, 96 U. S. 724.

BOND.

On writs of error and appeal, the bond must be approved by the judge or justice. He cannot delegate the power to the clerk.

Leave is granted to file a bond in due form.

On motion.

OPINION.—None of the objections to this appeal are, in our opinion, well taken, except the one which relates to the approval of the bond. That, we think, must be sustained. The security required upon writs of error and appeals must be taken by the judge or justice: Rev. Stat., § 1000. He cannot delegate this power to the clerk. Here the approval of the bond was by the clerk alone. The judge has never acted; but, as the omission was undoubtedly caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings. . . .

If the appellant desires that the appeal shall operate as a *supersedeas*, the bond may be in the sum of seven thousand dollars; otherwise, in the sum of two hundred and fifty dollars. The security may be approved by any judge or justice authorized to sign a citation upon an appeal in the cause; but this cause will stand dismissed unless the appellant shall, on or before the first Monday in March next, file with the clerk of this court a bond, with good and sufficient security, conditioned according to law, for the purposes of the appeal; and it is *So ordered.*

PEARSON *v.* YEWDALL, 95 U. S. 294.

AMENDMENT OF WRIT OF ERROR—PARTIES—DUE PROCESS OF LAW.

Where a motion to dismiss is entertained for want of necessary parties to the writ of error, leave to amend the writ by supplying the omission will not be granted when the record presents for review questions only which have been settled by decisions of this court.

Motion to dismiss granted.

OPINION.—It having been suggested to us at the last term that the city of Philadelphia was a party to this cause in the court below, and adverse in interest to the plaintiffs in error, leave was granted the defendants in error to move to dismiss this suit, because the city is not named in the writ; and for the city to appear by counsel to be heard in support of the motion. That motion has now been made, and the plaintiffs in error, while resisting it, ask leave, under § 1005 Rev. Stat., to amend their writ by naming the city as a defendant in case it shall appear to be necessary.

The City Councils, by ordinance, ordered that Paschall Street should be opened to public use. Thereupon the present defendants in error, owning property which would be taken by the opening, petitioned the Court of Quarter Sessions, conformably to the act of the General Assembly of Pennsylvania regulating such proceedings, to appoint proper persons to view the premises and assess their damages. In accordance with this petition, the court appointed a jury of six men to view the premises and assess the damages which had been sustained. Notice of their appointment and of the time and place they would meet to perform their duties was served upon all the owners of property through which the street would run. Availing themselves of this notice, the plaintiffs in error appeared among others and presented their claims.

Notice of the meeting was also served, in accordance with the further provisions of the statute, upon the law department of the city; and the solicitor, who was charged by law with the duty of representing and protecting the interests of the city in all such matters, appeared before the jury in his official capacity. The viewers, after a hearing, made a report to the court of their allowances to the several claimants. The plaintiffs in error excepted to the report, for the reason, among others, that the amount awarded to them was too small; and the city also excepted,

because it was too large. The Court of Quarter Sessions overruled the exceptions of both parties and confirmed the report. The plaintiffs in error then appealed to the Supreme Court, and the report being there again confirmed, they now seek to bring the case here for review upon this writ.

There can be no doubt but that the city is an indispensable party to this suit. The viewers were appointed at the instance of the defendants in error, but they were appointed in a proceeding by the city, in its nature adverse to all the property owners affected, for an appropriation of private property to public use. It nowhere appears that the interests of the plaintiffs in error are adverse to those of the defendants in error. They were both property owners, and both seeking compensation for their property before it should be opened to the use of the public. The city alone represented the public, and was, therefore, the only party to the proceeding adverse to the claimants. Under such circumstances, we cannot properly review the judgment below in its absence.

The question now arises whether the plaintiffs in error shall have leave to amend. Section 1005 of the Revised Statutes authorizes this court in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances.

In this case we think the amendment ought not to be allowed. We have looked carefully through the record, and cannot find that any question is presented which has not been many times decided. We have held over and over again that art. 7 of the amendments to the Constitution of the United States, relating to trials by jury, applies only to the courts of the United States, Edwards *v.* Elliott, 21 Wall.

557, and in the act of the General Assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law within the meaning of that term as used in the Federal Constitution. To grant the amendment would, in our opinion, lead only to unnecessary delay and expense. *Writ dismissed.*

CAMBUSTON *v.* UNITED STATES, 95 U. S. 285.

APPEAL—PRACTICE.

An appeal taken, and a motion for a new trial made, after the time allowed by law and rules of practice, being too late, a motion to dismiss is granted.

Motion to dismiss granted.

OPINION.—This is an appeal from the District Court of the United States for the District of California, in a proceeding under the "Act to ascertain and settle the private land claims in the State of California," passed March 3d, 1851. 9 Stat. 631. The case was here at the December Term, 1857, when a former decree of the District Court was reversed and the cause sent back for further hearing. United States *v.* Cambuston, 20 How. 59. The mandate was filed in the court below May 5th, 1859, and the further hearing resulted in a decree November 12th, 1859, rejecting the claim. The court adjourned for the term on the first Monday in December, 1859, previous to which time no motion for a new trial or petition for rehearing had been filed.

On the 24th of February, 1860, Lansing B. Mizner, as "a party in interest," filed with the clerk of the court a petition for rehearing. What his interest actually was nowhere appears in the record. A copy of this petition was served on the district attorney of the United States the same day the

original was filed in the clerk's office; and, March 13th, 1860, the district attorney and the attorney for the claimant entered into the following stipulation :—

"It is hereby stipulated that Tully R. Wise, acting United States district attorney, waived written notice to him of a motion to be made for a new trial during the term of the United States District Court, ending the first Monday in December last, and that he considered a verbal notice of intention to move as sufficient to him, and then given to him, the said Wise. It is further stipulated, that, if the said Henry Cambuston now has the right to have the said motion heard, it shall not be prejudiced by delay until the return of the Hon. Ogden Hoffman."

Nothing further was done until April 2d, 1875, when the widow of Cambuston—he having died January 22d, 1869—appeared in court and asked to "be permitted to become the party claimant of the land," as executrix of the will of her deceased husband, which had been admitted to probate May 3d, 1869. An order to this effect was made April 3d, 1875, and on the same day the claimant asked that a new trial be granted, and that the decree rejecting the claim might be reversed. The parties thereupon appeared, and, after hearing, the court denied the motion. On the same day, April 3d, 1875, this appeal was allowed, both from the final decree and the order refusing a new trial. The United States now move to dismiss the appeal, because taken too late.

The statute in force when the decree was rendered, provided that writs of error and appeals should not be brought to this court except within five years after passing or rendering the decree or judgment complained of. 1 Stat. 85, § 22. As this decree was rendered November 12th, 1859, and the appeal not taken until April 3d, 1875, it is clear that the motion to dismiss should be granted, unless the petition for rehearing or motion for a new trial suspended the operation of this statute.

In Brockett *v.* Brockett, 2 How. 238, it was held that a petition for rehearing filed during the term, and actually entertained by the court, suspended the operation of a decree in equity until the petition was disposed of. Neither the petition for a rehearing nor the motion for a new trial in this case was filed, or the attention of the court in any manner called to such a proceeding, during the term at which the decree was rendered. The proceeding before the District Court was statutory, and not at common law or in equity. It was, however, a suit, and must be governed by the rules of law applicable to that class of judicial proceedings. Consequently, when the term closed at which the decree was rendered, the parties were out of court, and the jurisdiction ended so far as that court was concerned, no steps having been taken to keep it alive. The decree was then in full force and operative for all purposes.

According to the practice in suits at common law and in equity, no step has since been taken which can have the effect of suspending the decree for the purpose of an appeal. By § 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; and by § 987, when a Circuit Court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment to give time to file in the clerk's office of the court a petition for a new trial. If such petition is filed within such term of forty-two days, with a certificate thereon of any judge of the court that he allows it to be filed, execution shall, of course, be further stayed until the next session of the court. From this legislation it is apparent that it was not the policy of Congress to

suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition. Here judgment was rendered November 12th, 1859, and the petition for rehearing was not filed until one hundred and twenty-five days thereafter. The stipulation between counsel, under date of March 13th, 1860, was not that a motion for new trial had been filed, but that notice of an intention to make such a motion had been given; and that, if a hearing could then be had, it should not be prejudiced by further delay until the return of the district judge. This application seems never to have been brought to the attention of the court. It is unnecessary to decide whether such a motion can be filed after the term has closed, if no application is made during the term for stay of execution under the statute or for an extension of time to prepare the motion.

In suits in equity the practice is even more strict. Equity rule 88 provides that, in cases where an appeal lies to this court, no rehearing shall be granted after the term at which the final decree shall have been entered and recorded.

We are clearly of the opinion, therefore, that the appeal from the decree of November 12th, 1859, was not taken in time, and as no appeal lies from the order refusing the new trial, Warner *v.* Norton *et al.*, 20 How. 448, it follows that the motion to dismiss must be granted; and it is

So ordered.

NIMICK *v.* COLEMAN, 95 U. S. 266.

APPEAL.

No appeal lies to this court from the action of a Circuit Court refusing to take jurisdiction upon an appeal, but proceeding under its supervisory jurisdiction alone.

Motion to dismiss granted.

OPINION.—We think the motion to dismiss in this case must be granted. The record shows affirmatively that the

Circuit Court refused to take jurisdiction upon the appeal, and did proceed under its supervisory jurisdiction alone. The case is thus brought directly within our decision in Stickney *v.* Wilt, 23 Wall. 150; and, as the order of the District Court has been affirmed, we are not called upon to determine whether we should set aside the action of the Circuit Court for want of jurisdiction, as we did in that case, because there was a reversal. If, as is claimed, the District Court acted without jurisdiction, or in a manner not to bind the parties, its decree as made was void; and the aggrieved partnership creditors may very properly consider whether they cannot proceed in equity to call the trustees to a proper accounting and distribution. Upon that question, however, we express no opinion. We are clear that no appeal lies to this court from the action of the Circuit Court in respect to what has been done; and the suit is accordingly

Dismissed.

CONRO *v.* CRANE, 94 U. S. 441.

BANKRUPTCY—SUPERVISORY JURISDICTION OF CIRCUIT COURTS.

A proceeding in the Circuit Court, acting under its supervisory power in bankruptcy, is not appealable.

Motion to dismiss granted.

OPINION.—It must now be considered as settled that appeals do not lie to this court from the decisions of the Circuit Courts in the exercise of their supervisory jurisdiction under the bankrupt law. In Wiswall *et al. v.* Campbell *et al.*, 93 U. S. 347, we held that "a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the Bankrupt Court in the progress of the cause are . . . but parts of the suit in bankruptcy from which they cannot be separated." And again: "Every person submitting himself to the jurisdiction of the Bankrupt Court in

the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding." And in Sandusky *v.* National Bank, 23 Wall. 293, it was decided that "any order made in the progress of the cause may be subsequently set aside and vacated, upon proper showing made, provided rights have not become vested under it which will be disturbed by the vacation."

These principles are decisive of this case. The rights of the parties grow out of a sale made by the court under the authority of § 5065 Revised Statutes. The bids were received by the provisional assignee, but the court determined which should be accepted, and gave directions as to the transfer of title. Clearly, then, what was done both as to the first and second sale was in the course of the bankruptcy proceeding and part of that suit. As such, it was subject to revision in the Circuit Court under its supervisory jurisdiction.

Both Hodgkins and Conro & Carkin submitted themselves to the jurisdiction of the court to the extent that was necessary for the completion of their respective purchases. Conro & Carkin were parties to the proceeding by which the sale to Hodgkins was set aside and that to them made. Having been in court when the order under which their claim was made, they can properly be brought in to answer a motion to set it aside. Such a motion would not be a new suit, but a new proceeding in the old suit in bankruptcy, and therefore not subject to revision here upon appeal.

This was evidently the understanding of the parties at the time; for the original petition of Hodgkins and Crane was filed in the District Court sitting in bankruptcy, and the petition for review purports, on its face, to be filed under § 4986 Revised Statutes, which confers the supervisory jurisdiction. *Appeal dismissed.*

DAYTON *v.* LASH, 94 U. S. 112.

APPEAL—CITATION.

An appeal being taken out of term, a citation must be served to bring parties in.

Where, in the discretion of this court, circumstances warrant it, leave to serve a citation will be granted.

Motion to dismiss granted—*nisi.*

OPINION.—This record shows that an appeal was allowed, a *supersedeas* bond approved, and a citation signed February 26th, 1876; but it does not show a service of the citation, and the affidavits presented upon this motion fail to satisfy us that proper service was ever in fact made. The appeal was, however, duly obtained; and the record has been filed and the cause docketed here. We have, therefore, the record; but a service of the citation is necessary to bring the parties before us, as the appeal was taken out of term. We cannot proceed to hear and determine the cause until the parties are here, either constructively by service, or in fact by their appearance.

Perhaps the language of Mr. Chief Justice Taney, in Villabolos *v.* United States, 6 How. 90, and in United States *v.* Curry, id. 112, as well as of Mr. Justice Nelson, in City of Washington *v.* Dennison, 6 Wall. 496, if read literally and without reference to the facts then under consideration, may be broad enough to justify a dismissal of this appeal, because the citation was not served before the first day of the term. But in the case of Villabolos the real question was as to the validity of the citation, and not as to its service, if valid; in Curry's case the citation was not issued until after the term at which the appeal was returnable; and in City of Washington *v.* Dennison the effort was to obtain a *supersedeas* in a case where the writ was not sealed until eleven days after the rendition of the judgment. None of the cases

made it necessary to decide that a citation actually issued upon the allowance of an appeal must be served before the first day of the term, in order to preserve our jurisdiction; and we think that such an omission does not avoid the appeal, but rather furnishes a case where, under the rule in Martin *v.* Hunter's Lessee, 1 Wheat. 361, and followed in Davidson *v.* Lanier, 4 Wall. 454, we "may grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper."

As this appeal was returnable to the present term, and some attempt was made to serve the citation, which the appellants may have supposed was actually completed, we order that, unless the appellants cause a new citation, returnable on the first Monday in February next, to be issued and served upon the appellee before that date, the appeal be dismissed.

HURST *v.* HOLLINGSWORTH, 94 U. S. 111.

APPEAL—PRACTICE—WRIT OF ERROR.

A transcript being docketed in this court as upon a writ of error, there being in the case both a writ of error and an appeal, the court will determine at the hearing upon which the case is properly in this court, and will not dismiss the case on motion.

Motion to dismiss denied.

OPINION.—Hurst, the plaintiff below, being in doubt whether his case was one to be brought here by appeal or by writ of error, took the precaution of suing out a writ of error and also of obtaining the allowance of an appeal. At the proper time he filed a transcript of the record, and the cause was docketed by the clerk as upon a writ of error; thereupon the defendant moved to docket and dismiss the appeal. Hurst now appears and asks leave to docket his appeal. The defendant does not object to this, but, treating

it as an election for Hurst to proceed here upon the appeal, moves to dismiss the writ of error.

These motions are all denied. There was but one action in the court below, and there is but one record. When the transcript of that record was brought here by Hurst, his cause was docketed. It is not necessary to enter it twice, because, out of abundant caution and to guard against a possible chance of dismissal, he has brought it here in two ways. He has but one cause; and when we come to examine it we will determine whether it is properly here by appeal or by writ of error, and will proceed accordingly.

Motions denied.

BURROWS *v.* THE MARSHAL, 15 Wall. 682.

APPEAL—PRACTICE—WRIT OF ERROR.

On petition for a rule on a marshal to show cause why he should not make a deed to the highest bidder for land sold on execution, a judgment discharging the rule, and for costs against the petitioner, cannot be reviewed in this court except by writ of error. No appeal lies.

Motion to dismiss granted.

OPINION.—Two judgments, as the appellant represents, were rendered in the Circuit Court at Raleigh, November Term, 1869, against one Taylor, in favor of the creditors therein named, for certain specified amounts, and that the same were placed in the hands of a deputy marshal for collection; that the marshal, having levied the executions upon a certain described parcel of land, advertised the same for sale according to law, and that the petitioner became the purchaser thereof, being the highest bidder at the sale, for the sum of one hundred and ten dollars, which, as he alleges, he paid to the deputy marshal; that at the ensuing term of the court he applied to the marshal to execute to him as the purchaser a deed of the interest so purchased and

paid for as aforesaid; that the marshal having refused to comply with the request, he then prepared and tendered to the marshal a proper draft for a deed, and requested him to execute the same, which he refused and still refuses to do, and has given notice that he will sell the premises upon other executions in his hands. Wherefore the petitioner prayed the Circuit Court to lay a rule upon the appellee, as such marshal, to show cause at the next term of the court why he should not make to him as the purchaser a good and sufficient deed in fee simple of the described tract, and he also prayed for an order staying all further proceedings under the said other executions in his hands toward a resale of the premises which he purchased.

Subsequently the appellee appeared and filed an answer, and the record shows that the court, at the succeeding November Term, rendered judgment for the appellee, directing that the rule be discharged, and that the petitioner pay all costs. Whereupon the petitioner appealed to this court.

Such a motion as the one first described and the rule granted under it were proceedings at law, and so also were the judgment and the order of the court directing that the petitioner should pay all costs, and the court is of the opinion that the judgment could not be removed into this court in any other way than by a writ of error; that an appeal will not lie to this court in such a case under the twenty-second section of the Judiciary Act, and that the appeal must be

Dismissed for want of jurisdiction.

HAMPTON *v.* ROUSE, 13 Wall. 187.

PRACTICE—WRIT OF ERROR.

In a writ of error to a joint judgment against several, all must join.

Motion to dismiss granted.

OPINION.—It has often been held that in a writ of error to a joint judgment against several, all must join; and that the omission of one or more, without such proceeding, is an irregularity for which the writ will be dismissed. The motion in the present case must, therefore, be *Granted.*

WHEELER *v.* HARRISON, 13 Wall. 51.

APPEAL—PRACTICE.

Where two appeals are taken—the first being from a decree of affirmance without taxing costs or mentioning the sum for which it was rendered—the second is held to be the final decree, and the first is dismissed.

Motion to dismiss granted.

OPINION.—It is quite true that two appeals are not allowed in the same case on the same question. We must determine which one of the two should be dismissed. It may be that the first appeal was from a decree which might be taken as final if the second decree had not been rendered. But it is obvious that the circuit judge did not regard it as final, and it was certainly defective. The second decree was rendered, not by inadvertence, but in view of the rendition of the first decree; and, in order to settle the practice in the Circuit Court for the Southern District of New York, that a decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.

We think this the better practice, and therefore hold that the first appeal must be *Dismissed as irregular.*

The Protector, 12 Wall. 700.

Limitations—Rebellion.

The proclamations of blockade, and that the war had closed, marked the periods of beginning and ending of the Rebellion, in the several States therein mentioned.

Motion to dismiss granted.

Opinion.—The question in the present case is, when did the Rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the Statute of Limitations by the War of the Rebellion?

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade: the first of the 19th of April, 1861, embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861, embracing the States of Virginia and North Carolina; and there were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866,

embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866, embracing the State of Texas.

In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be

Granted.

The Protector, 11 Wall. 82.

Amend—Appeal—Parties—Writ of Error.

In both writs of error and appeals, a defect in the title of the parties is fatal to the jurisdiction of this court.

On motion.

Opinion.—The motion made by the appellees to dismiss the case from the docket for want of jurisdiction is grounded upon a defect of the title of the parties in the appeal as allowed. The title is "William A. Freeborn & Co. *v.* The Ship Protector and owners." This defect in a writ of error has been held fatal to the jurisdiction of the court, since the case of Deneale *et al. v.* Stump's Executors, down to the present time. Nor can the writ be amended, according to repeated decisions of this court. Porter *v.* Foley, 21 How. 393; Hodge *v.* Williams, 22 How. 87. The only question before us is whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were

brought here for re-examination by a writ of error, under the 22d section of the Judiciary Act. This was changed by the Act of March 3d, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act provides "that the appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

In Owings *et al. v.* Andrew Kincannon, the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the court, referred to the case of Williams *v.* The Bank of the United States, which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the case of an appeal. He cited the Act of 1803, and observed that "the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error." But the case of Francis O. J. Smith *v.* Joseph W. Clark, is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal, under the 43d rule of the court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be Joseph W. Clarke *and others*, from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate.

He then referred to the case of a writ of error, where it was held that all the parties must be named in the writ, and the name of one or more of them *and others* were not a sufficient description; and, also, to the case of Holliday *et al. v.* Baston *et al.*, where the same principle was applied to a writ of error docketed under the 43d rule, and observed the

same reason for requiring all the parties whose interests were to be affected by the judgment to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled.

The opinion of the court in the present case is, that no distinction in respect to the question before us can be made between the case of an appeal under the Act of 1803, and of a writ of error; and that the decisions referred to, directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation, and bond, and also the motion to amend the libel.

Motion to dismiss granted.

Mr. Justice Swayne and Mr. Justice Bradly dissented.

MILLER *v.* MCKENZIE, 10 Wall. 582.

PARTIES—WRIT OF ERROR.

A writ of error brought in the names of persons specified "and others" is fatally defective.

Motion to dismiss granted.

OPINION.—It appears, from an inspection of the record, that the writ of error is defective in respect to the parties. It is therein recited that the proceedings are between Pitzer Miller and Larkin McKenzie *and others*. This defect has been held so many times in this court as fatal to its jurisdiction that it need be but mentioned to require a dismissal of the case. *Motion granted.*

PENNSYLVANIA *v.* QUICKSILVER COMPANY, 10 Wall. 553.

JURISDICTION—ORIGINAL OF THIS COURT.

A State may sue in this court a citizen of another State, but not one of her own citizens. To sue a corporation, there must be a distinct averment that the corporation was created by the law of a given State.

Motion to dismiss granted.

OPINION.—By the second section of the third article of the Constitution, it is ordained that the judicial power shall extend "to all controversies between a State and the citizens of another State." The second clause of this section provides "that in all cases affecting ambassadors, etc., and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. . . . In all other cases before mentioned, it shall have appellate jurisdiction."

This second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction, but does not profess to confer any.

The thirteenth section of the Judiciary Act, which provides for the jurisdiction of this court, accords with this construction.

A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State, but not against one of her own. And the question in this case is, whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California. And this turns upon another question, and that is, whether the averment there imports that the defendant is a corporation created by the laws of that State; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject.

The court is of opinion that this averment is insufficient

to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that State by its agent, but not that it had been incorporated by the laws of the State. It would have been very easy to have made the fact clear by averment, and, being a jurisdictional fact, it should not have been left in doubt. Indeed, it was admitted in the argument that the defendant was a Pennsylvania corporation, and the jurisdiction sought to be sustained by a suit against this agency. We have already shown that this is unavailable to support the jurisdiction.

Motion granted, and the *Writ dismissed.*

Blitz *v.* Brown, 7 Wall. 693.

Practice—Transcript—Writ of Error.

Statement.—A transcript was filed in this court accompanied by a blank form of certificate of authentication without proper seal or signature.

A motion to dismiss was filed on behalf of the defendant in error. Plaintiff in error moved for leave to withdraw the record for the purpose of perfecting the certificate and returning the record to its place on the docket.

Opinion.—The filing of such a paper as has been filed in this case is not the filing of the transcript at the next term after the issuing of the writ of error, without which we can have no jurisdiction of the case. The motion to dismiss must be allowed. So much of the motion made in behalf of the plaintiff in error as asks leave to withdraw the record is granted, but the residue of the motion must be denied. The case can be brought here only by a new writ of error.

PALMER *v.* DONNER, 7 Wall. 541.

CITATION.

A citation signed by a district judge, in a case from the Supreme Court of a State, is insufficient.

Motion to dismiss granted.

OPINION.—The revisory jurisdiction of this court over the judgments of State tribunals is defined by the twenty-fifth section of the Judiciary Act of 1789. It is there provided that the citation must be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. But the citation in the case before us was signed by a district judge. This was without authority of law, and the citation was, therefore, without effect. The case therefore is not properly in this court, and the writ of error must be *Dismissed.*

GERMAN *v.* UNITED STATES, 5 Wall. 825.

APPEAL—TRANSCRIPT.

In appeal cases from the U. S. District Court for Southern California, the transcript must be filed in this court within the first sixty days of the term.

Motion to dismiss granted.

OPINION.—The appeal in this case was allowed on the 26th October, 1864, and the record was filed here on the 21st August, 1865.

This was too late. The record should have been brought and filed within the first sixty days of the next term of this court. This was not done, nor was the record returned within the term. The appeal, therefore, must be

Dismissed.

ALVISO *v.* UNITED STATES, 5 Wall. 824.

CITATION.

A citation, unless waived, is indispensable to jurisdiction on appeal.

Motion to dismiss granted.

OPINION.—The final decree in the District Court was ren dered on the 8th September, 1863, and an appeal was allowed, on motion of the claimant, on the 18th November, 1863. Upon this appeal no action was taken by the appellants. On the 23d February, 1864, an appeal was again allowed, and the record was brought to this court and filed November 11th, 1864.

This was in time, but no citation was issued to the adverse party, and there is nothing to show any waiver; and a citation, with due return, or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal.

The writ, therefore, must be *Dismissed.*

GARRISON *v.* CASS COUNTY, 5 Wall. 823.

APPEAL—PRACTICE—CITATION.

Where an appeal is prayed and allowed *nunc pro tunc* four years after the date of the decree, the appeal is dismissed for want of jurisdiction, the record not being brought up in time, and there being no citation nor waiver of one.

Motion to dismiss granted.

OPINION.—The decree in this case was rendered on the 13th June, 1861. No appeal was prayed or allowed until the June Term, 1865. At that term, on motion of the defendants below, an appeal was allowed *nunc pro tunc*, as of 13th June, 1861.

There is nothing in the record which warranted the making

of this order; nor, if it could have been lawfully made, would it avail the defendant, for there was no citation to the appellees, and the record was not brought up at the next term of this court.

At most it can only be regarded as an allowance of an appeal at the June Term, 1865, and no citation appears to have been issued since to the appellees, nor was there any equivalent notice, nor has there been any waiver.

The appeal must therefore be

Dismissed for want of jurisdiction.

JONES *v.* LA VALLETTE, 5 Wall. 579.

APPEAL—WRIT OF ERROR.

An appeal is dismissed where the case should have been brought up by writ of error.

Motion to dismiss granted.

OPINION.—The Judiciary Act of 1789 gave appellate jurisdiction to this court by writ of error, and it was held that under that act no cause could be brought here by appeal.

The Act of 1803 gave appellate jurisdiction by appeal "from final judgments and decrees in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize." No other cases can be brought here in this mode, and the case in the record is of neither class. It must come here, if at all, upon writ of error.

The appeal must therefore be

Dismissed for want of jurisdiction.

BROBST *et al. v.* BROBST, 4 Wall. 2.

DIVIDED COURT.

On a certificate of division, the question being one of fact, this court is without jurisdiction, and will remand the case without answer.

STATEMENT.—The controversy involves a question of fraud concerning the title to land.

On motion.

OPINION.—The question is one of fact and can only be determined by an examination of the evidence in the record; and it has been repeatedly determined that only questions of law upon distinct points in a cause can be brought to this court by certificate.

An order must be made, therefore, remanding this cause to the Circuit Court, without answer to the question certified, for want of jurisdiction.

CLEVELAND *v.* CHAMBERLAIN, 1 Black, 419.

AFFIDAVITS—MOOT QUESTION.

Where the appellee purchases the interest of the appellant and carries on the controversy for the purpose of obtaining the opinion of this court to the injury of third parties, the appeal will be dismissed.

The fact may be shown by affidavits and other extrinsic evidence.

Such a proceeding is reprehensible and a punishable contempt of court.

Motion to dismiss granted.

OPINION.—This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.

There is no material difference between this case and that

of Lord *v.* Veazie, 8 How. 257, when the whole proceeding was justly rebuked by the court as "in contempt of the court, and highly reprehensible."

That case originated in a collusion between the parties. In this case the appellee, who was a judgment creditor of the La Crosse and Milwaukee Railroad, filed his bill to set aside a fraudulent conveyance of the debtor's property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respondent. The case was prosecuted with vigor by the complainant till a decree was obtained, on the 11th of February, 1859, setting aside the various assignments and the case "committed to a master to ascertain and report the annual income of the several lots described in the bill," etc. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on the 12th of February, 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the decree was entered Chamberlain became the equitable owner of Cleveland's judgment, and the "*dominus litis*," on both sides. He then agreed to pay counsel who appeared for Cleveland, the appellee, but, for anything that appears, without the knowledge of the counsel, who in July, 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.

It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that *there*, both parties colluded to get up an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court affecting the rights and interests of persons not parties to the pretended controversy.

We repeat, therefore, what was said by the court in that case, "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

It is but proper to say, that the counsel who have been employed in the case are entirely acquitted of any participation in the purposes of the party.

This case came on to be argued on the transcript of the record from the Circuit Court of the United States for the District of Wisconsin; and it appearing to the court here, from affidavits and other evidence filed in this case in behalf of persons not parties to this suit, that this appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court to affect the interests of persons not parties, it is therefore now here ordered and adjudged by this court, that the appeal in this case be, and the same is hereby, dismissed, with costs.

BALLANCE *v.* FORSYTH *et al.*, 21 H. 389.

APPEAL—RECORD—LEAVE TO WITHDRAW—"CONSENT OF PARTIES CANNOT GIVE JURISDICTION."

Motion to reinstate denied.

OPINION.—This case was dismissed on the 20th of December last, because it did not appear that an appeal had been taken in the District Court. A motion has now been made to reinstate the case, and, in support of the motion, a written agreement, signed by the counsel for the appellant and appellee, has been filed, consenting to reinstate the case, to waive all irregularities, and to try the case on the merits.

But the consent of parties cannot give jurisdiction to this court where the law does not give it. And without an appeal taken in the District Court, this court has no jurisdiction, and the consent of parties cannot cure the defect. The motion is therefore overruled.

But if the plaintiff in error desires to supply the omission, and take an appeal in the District Court, and bring his case legally before us, he has leave, in order to save expense, to withdraw the transcript now filed, and to use it upon his appeal, leaving a receipt for it with the clerk of this court.

CARTER *v.* BENNETT, 15 H. 354.

CITIZENSHIP—PLEA.

A defendant in a State court should raise the question of his citizenship in that court by plea.

Motion to dismiss granted.

OPINION.—This case comes before us upon a writ of error directed to the Supreme Court of the State of Florida; and a motion has been made to dismiss it for want of jurisdiction.

The suit was brought by Bennett, the defendant in error, against Carter, the plaintiff in error, in December, 1842, while Florida was yet a Territory, and was continued from term to term until she was admitted into the Union as a State. The action was trover for certain property. The declaration was in the usual form, and the defendant pleaded the general issue of not guilty. After Florida became a State and the Territorial court, in which the suit was pending, ceased to exist, the papers were transmitted by the clerk to the Circuit Court of the State for the same county. The plaintiff and defendant both appeared in the Circuit Court, and the case was continued until December, 1848, when the parties proceeded to trial, and the jury found for the defendant in error, and assessed his damages at nineteen thou-

sand nine hundred and ninety-nine dollars and sixty-six cents. Several exceptions were taken to the ruling of the court on the trial, which it is not necessary to mention, because they relate to the laws of the State, over which this court can exercise no jurisdiction upon this writ of error. After the verdict was rendered against him, the plaintiff in error moved for a new trial. But the motion was overruled by the court. He thereupon offered to prove that he was a citizen of Georgia at the time the suit was instituted in the Territorial court, and had continued to be so, and still was a citizen of that State. And this fact being admitted by the opposite party, he moved in arrest of judgment, and that the case be dismissed from the court with an order to the clerk to transfer the papers to the District Court of the United States for the Northern District of Florida, or hold the papers and proceedings subject to an order of transfer or demand from the said court.

This motion was refused, and judgment entered on the verdict. Whereupon he appealed to the Supreme Court of the State; and the judgment of the Circuit Court being there affirmed, he has brought the case before this court by writ of error.

In support of this writ, the plaintiff in error contends, that as he was a citizen of Georgia at the time the suit was brought in the Territorial court, and also when the act of Congress of February 22d, 1847, was passed, the suit was by operation of law transferred to the District Court of the United States for the Northern District of Florida, and that the Circuit Court of the State had no right to take possession of the papers in the case, nor any authority to try and decide it; and that, by moving in arrest of judgment upon this ground, he had claimed a right under a law of the United States; and that as the decision was against the right claimed he is entitled to a writ of error under the twenty-fifth section of the Act of 1789. Upon this motion to dismiss the writ

of error, the construction of the act of Congress of 1847 is not before us. In this stage of the case we are not called on to decide whether this act of Congress did or did not, *proprie vigore*, transfer the case to the District Court of the United States. The only question presented by the motion is whether, upon the record before us, we have a right to reverse the judgment of the State court. And in order to give this court jurisdiction over the judgment of the State court, it must appear by the record that the right now claimed by the plaintiff in error, to remove the case to the District Court of the United States, was so drawn in question in the State court that it must have been decided in the judgment it has given.

Now, there is nothing in the pleadings to show that Carter was a citizen of Georgia. It is not so stated in the declaration or plea. And when the papers were transmitted to the State court, he appeared there, and defended himself upon the plea of the general issue, which he had put in in the Territorial court. This plea admitted the jurisdiction of the court, and the case was tried and the verdict rendered upon these pleadings. And upon a motion in arrest of judgment, the court cannot look beyond the record; and the judgment cannot be arrested, unless there is some error in law or defect in jurisdiction apparent in the proceedings. And here there was no error or defect of jurisdiction apparent on the record, even if the construction of the Act of 1847, contended for by the plaintiff in error, is the true one.

Both parties by their pleadings admitted the jurisdiction of the court, and there was no averment in any part of them that Carter was a citizen of Georgia. And after a verdict is rendered the judgment cannot be arrested by the introduction of new evidence on a new fact. It may, in a proper case, lay the foundation of a motion for a new trial, but not in arrest of judgment. It is evident, therefore, that the State court, in proceeding to give judgment on the verdict, could

not legally have decided upon the validity of the plaintiff's objection to its jurisdiction. They could not hear evidence in that stage of the case to prove that Carter was a citizen of Georgia, nor judicially notice it when admitted by the opposite party. And we are bound to presume that they proceeded to judgment on this ground, and did not consider the right claimed by the plaintiff in error as properly before them.

In an action in a Circuit Court of the United States, where the jurisdiction depends upon the citizenship of the parties, it has always been held, that where the plaintiff avers in his declaration that he and the defendant are citizens of different States, if the defendant means to deny the fact and the jurisdiction, he must plead it in abatement; and if he omits to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial. Still less could he be permitted to do so upon a motion in arrest of judgment. And the same principles which this court sanction in such cases in the courts of the United States, upon questions of jurisdiction, depending upon personal privilege, we are bound to apply to the proceeding in the State court.

Undoubtedly, it was in the power of the plaintiff in error, when he appeared to the suit in the Circuit Court of the State, to have pleaded to the jurisdiction, upon the ground that he was a citizen of Georgia. Whether such a plea could have been maintained or not, it is not necessary for us to say. But it would have brought before the court the construction of the Act of 1847, and it must have been judicially decided. And if the decision had been against the right he claimed under it, this court would have had jurisdiction to hear and determine that question. But upon the record, as it comes before us, it does not appear that this question was ever presented to the State court in a manner that would enable it judicially to notice or decide it. And the writ of error must, therefore, be dismissed for want of jurisdiction.

GAGE *v.* PUMPELLY, 108 U. S. 164.

AFFIDAVIT—AMOUNT—PREPONDERANCE OF EVIDENCE.

Evidence appearing in the record sustaining jurisdiction, and affidavits both in favor of, and against, jurisdiction, the preponderance of evidence against jurisdiction being insufficient, a motion to dismiss is overruled.

Motion to dismiss denied.

OPINION.—Many of the affidavits sent up with the transcript state distinctly that the value of the property, which is the matter in dispute, exceeds five thousand dollars. When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high. There is no such decided preponderance of the evidence in this case against jurisdiction as to make it our duty to dismiss the appeal which has been allowed. *Motion denied.*

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